Supreme Court, U.S.
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In The

# Supreme Court of the United States

MANUEL R. CENDEJAS JR.,

*Pro Se Petitioner,*

vs.

GORDON R. ENGLAND, Secretary of the Navy,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

**Introductory Statement for #1 Question Presented for Review:** As a Hispanic civilian employee working for the Department of the Navy at Concord Naval Weapons Station, California, I was a victim of, and witness to, discrimination and violence upon minorities. The true facts are outrageous and shocking and I will forever live with the physical and emotional scars from that hostile workplace which has left me disabled and unemployable. Issues include diversity and human rights violations, workplace assaults and batteries, and reprisal for identifying discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000 et. seq.

Equally outrageous is the system that federal employees must use to challenge discrimination and harassment. The Equal Employment Opportunity Commission (EEOC) hearing examiner that heard my case manipulated the truth by ignoring the evidence presented to him, by blaming the victim (just as he had done in other valid complaints at CNWS), and by falsely claiming that I had voluntarily withdrawn several issues. Although the Navy is fully aware of the hard copy facts that brought this case to court and that were before the EEOC hearing examiner, the Navy has requested striking those facts from the record to dismiss the case so that the real issues will never be heard. Even worse, the North District Federal Court and the Federal Court Of Appeals are supporting the dismissal while ignoring the hearing examiner's own pre-hearing order that delineates the real issues that were modified prior to the hearing. The Navy's dismissal relies solely on EEOC hearing examiner's claim, which was

**QUESTIONS PRESENTED FOR REVIEW** – Continued

orally made at the opening of the hearing, that several issues were voluntarily abandoned. I am appealing the EEOC decision under 29 C.F.R. section 1614.604(c) and I am requesting due process to hear all of my complaints in a full and fair hearing before a jury of my peers.

**Question #1 Presented for Review:** Did the EEOC hearing examiner commit harmful error by excluding evidence that adversely affected the substantial right of the complainant?

**Introductory Statement for #2 Question Presented for Review:** Upon realizing that the Navy was basing a dismissal of my discrimination and reprisal claims solely upon the findings and conclusion of the EEOC hearing examiner, I responded to the Court with a rebuttal of the examiner's findings and conclusion. I attached several of my strongest documents of evidence exhibits that were before the EEOC examiner at the hearing and also included quoted testimony from transcripts of the hearing. Because I had not asked for the Courts permission to file that rebuttal brief, the Navy opposed the filing and the Courts struck my response brief from consideration and from the record.

**Question #2 Presented for Review:** Did the EEOC hearing examiner and the Court commit a procedural error by excluding evidence that adversely affected the substantial right of the complainant?

**#3 Question Presented for Review:** Are the issues of the Plaintiff's claim so opprobrious and of such consequence to the overriding principle law and inconsistent with substantial justice as to warrant a reconsideration?

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## OPINIONS AND JUDGMENTS SOUGHT TO BE REVIEWED

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, COURT'S JUDGMENT AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FILED 29 JULY 2002, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, COURT'S ORDER DENYING PETITION FOR PANEL REHEARING AND THE PETITION FOR REHEARING EN BANC, FILED 20 NOVEMBER 2003. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AFFIRMING JUDGMENT OF DISTRICT COURT, FILED 02 DECEMBER 2003. EEOC FINDINGS AND CONCLUSION, DATED 17 OCTOBER 1994, FROM THE ADMINISTRATIVE HEARING HELD ON 19 & 20 JULY 1994.

## BASIS OF JURISDICTION IN UNITED STATES SUPREME COURT

The Court has original jurisdiction over Plaintiff's claims under 28 U.S.C. § 1331.

## STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000 et seq.

## PLAINTIFF'S CASE DESCRIPTION

1. A brief description of the events underlying the action:

In the complaint, plaintiff alleges that he was discriminated against because of race (Mexican-American), national origin (Hispanic), and in retaliation for his prior EEO activity. More specifically, plaintiff has exhausted administrative remedies as to claims that:

A. plaintiff was discriminated against on the basis of national origin and race when:

1) the identified discriminating official (IDO), Robert Bruner, chose to hire a non-qualified non-minority WG-8 Tool Room Attendant over the highly qualified WG-10 Machinist plaintiff for the position of WG-11 Maintenance Machinist. Plaintiff agreed to withdraw his Equal Employment Opportunity (EEO) complaint for discriminatory non-selection in 1985 in exchange for the position. Bruner, henceforth known as IDO-Bruner, was plaintiff's second-line supervisor and also was the selecting official for Concord Naval Weapons Station, Public Works Department (CNWS-PWD);

2) the identified discriminating official (IDO), Al Johns, repeatedly used the Spanish word "si" in a derogatory tone and manner in the plaintiff's presence even after plaintiff requested Johns cease doing so. Johns, henceforth known as IDO-Johns, was plaintiff's immediate supervisor during 1992, the time period of subsequent EEO complaints;

B. plaintiff was discriminated against on the basis of national origin and race AND, plaintiff was subjected to reprisal for participating in EEO activities

(original complaint in 1985 and other EEO complaints filed in 1992 and 1993) when:

1) IDO-Bruner and IDO-Johns and other administrators (management) within the Department of the Navy denied plaintiff a safe work environment by failing to stop workplace hostilities against plaintiff by a co-worker, Michael Schick, from 1987 through 30 July 1992. Plaintiff identified hostilities to Federal workplace managers, Navy Security personnel, City of Concord, CA Police Department, EEO personnel and others; and so, plaintiff alleges said hostilities occurred with management's specific recorded knowledge. (Previously identified Schick confrontations are cited here for U.S. District Court).

2) IDO-Bruner and IDO-Johns and other administrators (management) within the Department of the Navy failed to protect the plaintiff from another co-worker, Michael Parisi. Plaintiff alleges managers were aware of the magnified hostilities after plaintiff identified Parisi to EEO investigators as a similarly situated co-worker that was receiving favoritism. Specific acts of hostility include the following:

    a. 16 July 1992 – Plaintiff provides IDO-Johns a letter of mutual verbal incident with Parisi over EEO issue of shop's tooling that Parisi had secured from plaintiff (an interim EEO issue from a previous complaint in which managers agreed shops tooling would not be locked away from plaintiff).

b. 30 July 1992 – Parisi assaults plaintiff with a "mule kick" to the plaintiff's chest while plaintiff was seated and using the telephone (managers were forewarned in writing by Parisi 45 minutes before this assault).

3) IDO-Bruner and IDO-Johns and other administrators within the Department of the Navy failed to objectively investigate assaults [identified in B. 1) and B. 2) above] or achieve resolution to stop hostilities that were identified by plaintiff through various means. Managers instead focused efforts to blame and punish plaintiff all the while protecting the non-minority assailants and permitting hostilities to continue.

4) IDO-Bruner denied plaintiff equal training opportunities (welding school, forklift license, air compressor maintenance) extended to non-minorities.

5) IDO-Bruner denied plaintiff sustained satisfactory performance awards extended to all non-minorities.

6) IDO-Bruner denied plaintiff due process in the following manners:

a. IDO-Bruner denied plaintiff Union representation of plaintiff's choice during adverse and/or hostile actions.

b. IDO-Bruner denied plaintiff EEO representation at adverse actions that plaintiff had identified as reprisal for participating in a protected activity.

c. IDO-Bruner failed to consider all relevant facts and witnesses during investigations related to workplace assaults and adverse actions upon the plaintiff. Plaintiff alleges IDO-Bruner did so to suppress the facts in order to retaliate against plaintiff with adverse actions.

7) IDO-Bruner made defaming and/or slanderous statements about plaintiff causing character assassination, damage to plaintiff's social status in the workplace and intentional emotional distress upon plaintiff. Specific instances are as follows:

a. IDO-Bruner portrayed the plaintiff as the instigator of workplace hostilities to EEO investigators, Naval Security investigators, civilian police investigators, the district attorney, and in IDO-Bruner's own in-house disciplinary investigations.

b. IDO-Bruner made open remarks to EEO investigators, Navy security, and other co-workers of the plaintiff that the plaintiff was "mentally ill."

i) IDO-Bruner made a statement to Navy Security, Petty Officer Nielson, to watch his weapon around the plaintiff because plaintiff was "mentally unstable." This incident occurred on 30 July 1992 when PO Nielson was assigned to investigate the workplace assault upon the plaintiff. Plaintiff alleges IDO-Bruner made this statement to influence PO Nielson's investigation

and to support IDO-Bruner's retaliation.

ii) IDO-Bruner told EEO investigator, Steve Kawakami, that "aggrieved is mentally ill," on 15 September 1992.

c. IDO-Bruner informed former co-worker, Gary Ritchie, that plaintiff was a troublemaker and detailed intentions to downgrade plaintiff's position (from WG-11 to WG-10) while defending non-minority, Parisi's, wage grade to stay same.

d. IDO-Bruner informed Human Relations Specialist, Terisa Williams, that plaintiff was the "cause and effect of trouble" in the verbal assault of 19 February 1992. Williams relayed this information to plaintiff's Union Steward, Frank Sturgis on same day.

e. IDO-Bruner informed co-worker, Ray Pieterick, that plaintiff was the cause and effect of assault on 30 July 1992 and solicited and influenced a written statement from Pieterick.

f. IDO-Bruner informed co-worker, Chuck Dwyer, that he (IDO-Bruner), had to see Concord Naval Weapons Station (CNWS) Captain (Commander Owens) about "getting Rick (plaintiff's nickname) restricted" from station on 13 August 1992.

g. IDO-Bruner advised CNWS Captain Owens that plaintiff was a threat and should be restricted from station, which

led to plaintiff's station restriction on 13 August 1992.

h. IDO-Bruner informed Department Head of Transportation, Gino Piazza, that plaintiff was subversive and a threat to others. On or about August 1992, Piazza relayed this information to subordinate worker, Harold Hinton, advising Hinton not to associate with the plaintiff.

i. IDO-Bruner informed main gate security sentry, PO Gergen, not to allow plaintiff onto the station because of base restriction after IDO-Bruner knew plaintiff was cleared to enter station for an EEO appointment on 21 August 1992.

j. IDO-Bruner informed CNWS Security Officer, Mike Lewis, that plaintiff was subversive and a threat to others. Lewis relayed this information to USMC Corporal Rodriguez, advising Rodriguez not to associate with the plaintiff and to inform Lewis when plaintiff entered Rodriguez's work area. Occurred on or about August 1992.

k. IDO-Bruner informed co-worker, Russell Maynard, that plaintiff had problems and advised Maynard not to associate with plaintiff. Occurred August 21, 1992.

8) IDO-Bruner downgraded plaintiff's performance appraisal after plaintiff's final signature for the period ending 7 October 1989. Altered (downgraded using whiteout and bane comment added) performance appraisal was placed within plaintiff's personnel file. Plaintiff alleges this action was done to backdate

support for reprisal and to poison plaintiff's position with his new management [before a scheduled Dept. of Navy realignment in late 1992 from individual Public Works Departments to a centralized Public Works Center (PWC)].

9) IDO-Bruner withheld a letter of appreciation by the U.S. Marine Corps (dated 7 December 1992) from being properly placed within the plaintiff's personnel file.

10) IDO-Bruner and IDO-Johns denied plaintiff supervisory duty assignment opportunities extended to non-minorities.

11) IDO-Bruner and IDO-Johns placed a minimally satisfactory performance evaluation (rating period ending September 1992) within plaintiff's personnel file without plaintiff's review or final signature or knowledge.

12) IDO-Bruner and IDO-Johns engaged in a pattern of unwarranted harassment and adverse employment actions against plaintiff. Plaintiff prevailed in having all of the following disciplinary actions rescinded at the fourth step grievance procedure. Specific adverse actions are as follows:

    a. Placing plaintiff on leave without pay status while plaintiff was at work on three occasions as follows:

        i) .1 hour on 19 August 1992

        ii) 1.5 hours on 3 March 1992

        iii) 10 hours on 25 March 1992.

b. Creating and imposing a Letter of Reprimand upon plaintiff – dated 28 April 1992.

c. Creating and imposing a One-day Suspension upon plaintiff – dated 28 August 1992.

d. Recommending plaintiff's restriction from station on 14 August 1992.

e. Proposing Notice of Suspension upon the plaintiff leading to a Letter of Reprimand upon the plaintiff – dated 30 September 1992.

13) IDO-Bruner and IDO-Johns took no, or unequal, disciplinary action against the non-minority assailants of the plaintiff as compared to actions taken against the plaintiff.

14) IDO-Bruner and IDO-Johns took no, or unequal, disciplinary action against non-minorities for locking shop's tooling from plaintiff (against an interim EEO issue agreement).

15) IDO-Bruner and IDO-Johns took no, or unequal, disciplinary action against non-minorities for working on personal (non-agency) jobs as compared to actions taken against the plaintiff (against an interim EEO issue agreement).

16) IDO-Bruner and IDO-Johns and other Navy managers solicited written statements against plaintiff from plaintiff's co-workers including Lt. JG Fiori, Larry Lingerfeld, Susan Harlow, Ray Peterick, Susan Foster, and Raymond Johnson. Plaintiff alleges that these solicitations were made in effort to retaliate against

the plaintiff with adverse actions and also to support false contentions that plaintiff was the instigator of the hostilities.

17) IDO-Bruner and IDO-Johns used solicited written statements to discipline the plaintiff and as evidence within the EEO case file. Plaintiff alleges that managers, IDO-Bruner and IDO-Johns, never administered proper managerial procedures to investigate, defuse, and counsel for the incidents documented within said statements. Plaintiff was not even aware of several written statements until an Administrative Hearing discovery in 1993. Plaintiff cites one such "smoking gun" document in which plaintiff's identified hostile co-worker, Parisi, cites "using physical force" upon the plaintiff. Parisi provided said document to Navy managers only forty-five minutes before the plaintiff was viciously kicked by Parisi on 30 July 1992 yet managers failed to act to prevent the assault.

18) IDO-Johns inflicted intentional emotional distress upon plaintiff by confronting, yelling at, and/or harassing plaintiff while plaintiff was in the performance of duty, even after IDO-Johns was no longer plaintiff's supervisor. Specific hostile harassment incidents by Johns upon the plaintiff after Johns was no longer the plaintiff's supervisor include the following:

    a. 10 February 1993 while plaintiff was working with moving machinery. IDO-Johns then instigated a confrontation with plaintiff's supervisor, Don Coons, who in turn confronted plaintiff in anger

and proposing "possible adverse actions" upon the plaintiff

b. 10 April 1993 while plaintiff was working with moving machinery

c. yelling at and harassing plaintiff on 12 April 1993 while plaintiff was working with moving machinery (confirmed by statement from witness, Victor Light)

d. 22 June 1993 while plaintiff was processing a material order (confirmed by statement from witness, Fred Gamble)

e. 29 October 1993 while plaintiff was performing AFGE Union steward duties on the telephone (confirmed by statement from Terry Wright)

f. 3 November 1993 confronted plaintiff's immediate supervisor, Chris Coppinger, concerning plaintiff's Union Steward duties. Coppinger recognizes harassment and responds to Johns that "the issue was none of your (IDO-Johns') business and I (Coppinger) would appreciate it if you would not concern yourself with my employees."

19) IDO-Johns, during 1992, denied plaintiff the following as compared to other similarly situated and identified non-minorities;

a. equal overtime opportunities

b. an equal work space (plaintiff was ordered to move his toolbox to an area without proper lighting, electrical outlets, compressed air outlets or a vise).

c. equal access to shop's tooling

d. equal job assignments (IDO-Johns rearranged scheduled job assignments to give plaintiff the dirty work and also to move plaintiff away from his AFGE Union representative)

e. equal treatment in regards to standard rules (opportunity to have a flexible work schedule, equal use of leave, allowing personal work, disciplinary measures)

20) IDO-Johns inflicted intentional emotional distress upon plaintiff by causing and attempting to cause workplace conflicts between the plaintiff and the plaintiff's subsequent PWC managers, Don Coons (10 Feb 1993) and Chris Coppinger (3 Nov 1993). Plaintiff alleges IDO-Johns did so in continuing retaliation for participating in a protected activity (filing EEO complaints).

21) Omitted as a repeat issue.

22) IDO-Johns denied plaintiff permission to leave work to see a personal physician following the 30 July 1992 assault upon the plaintiff that resulted in serious injuries and several weeks of lost time to the plaintiff.

23) IDO-Johns removed plaintiffs written request for feedback by altering plaintiff's performance evaluation (literally cut plaintiffs written comment, pasted in a blank box, and photocopied the altered document) for the period 1 October 1991 to 30 September 1992.

24) IDO-Johns suppressed actions to mediate conflict between plaintiff and Parisi. Plaintiff

requested that California Community Dispute Services Program Coordinator, Mike Stafford, make efforts to resolve dispute with Parisi. Stafford documents a 6 October 1992 telephone conversation with IDO-Johns whereby Johns advises Stafford that Navy managers were affecting a resolution. No resolution was ever implemented.

25) the Agency failed to follow WPNSTA Concord Instruction 12750.1E, which details established policy and procedures for the administration of non-disciplinary, disciplinary, and adverse actions. The Agency placed a Letter of Caution dated 16 January 1991 within the plaintiff's personnel file with open knowledge that Letters of Caution are not to be placed within personnel files and are also to be expunged one year after presentation.

26) the Agency used said outdated Letter of Caution to support Letter of Reprimand dated 28 April 1992.

27) IDO-Bruner and the Agency failed to follow the AFGE Local 1931 Union Basic Agreement, Section 8, Article 22, which details established policy and procedures of handling adverse actions. "No record of a complaint against an employee which is determined to be unfounded, will be placed in that employee's Official Personnel Folder or records kept by supervisors." The Agency placed disciplinary actions [see item B.12) above] into plaintiff's personnel file while said actions were being adjudicated through the grievance procedure of the plaintiff's AFGE Union contract.

28) the Agency provided discovery documents for an Administrative Hearing as evidence to support shop conflicts that were never acted upon to achieve resolution or corrective actions.

29) the Agency failed to follow WPNSTA Concord Instruction 7400.1B, which details accounting procedures for union grievances, appeals, and representational functions. This instruction allows for representatives other than Union officials.

30) the Agency controverted continuation of pay benefits for the plaintiff after the 30 July 1992 assault upon the plaintiff and refused to cooperate with the Department of Labor after being ordered to pay said benefits.

31) the Agency withheld plaintiff's formal EEO complaint without notification during the worst period of plaintiff's alleged retaliation by plaintiff's identified discriminating officials. Hence plaintiff's 1 October 1992 complaint that the Agency intentionally delayed processing plaintiff's formal complaint filed 22 July 1992.

32) plaintiff alleges that as a result of retaliation by identified discriminating officials, plaintiff's subsequent managers denied the plaintiff, as a machinist, same access to the machine shop and refused to allow plaintiff to keep his tool chest within the machine shop.

C. plaintiff alleges that on 29 June 1992 another Hispanic employee, John Vigil, was similarly attacked by a non-minority co-worker and treated similarly by the IDO-Bruner, the Agency, and the

EEOC. In Vigil's case, the statements of IDO-Bruner were so outrageous that the Agency rescinded IDO-Bruner's written statements and also rescinded the Agency's controversion of Vigil's claim on 15 September 1992.

D. plaintiff alleges that other minorities, including Fred Gamble, had meritorious claims of discrimination and were subjected to civil rights abuses by the same managers during the same period of time and that their cases were similarly whitewashed by the Agency and the EEOC. EEOC Nos. 370-96-X2095 & X2098; Agency Nos. DON-93-60036-004, 017, 018 & 019.

E. plaintiff alleges that the Navy ("Agency") knew, or should have known about the long history of discriminatory employment practices by IDO-Bruner. IDO-Bruner admitted to a prior instance of passing out photocopied documents depicting "hunting season on porch monkeys" when IDO-Bruner was a manager at Mare Island Naval Shipyard (disclosed in testimony during a 1993 informal hearing before an EEO Administrative Judge).

F. plaintiff alleges that the Agency knowingly placed IDO-Bruner (who was then an identified discriminating official under investigation at Mare Island Naval Shipyard) into the General Foreman's position at Concord Naval Weapons Station to placate the Mare Island discrimination complaint (identified in E. above). Said action by the Agency put an identified discriminating official into a position to further discriminate. As a hiring selecting official and through his micro-management techniques (adverse actions, final sign-off on performance appraisals, conducting investigations and counseling workers) IDO-Bruner was able to, and did in fact, practice hiring discrimination, allowed hostilities

upon minorities, and retaliated against those that exposed his discriminatory practices.

G. plaintiff alleges that IDO-Bruner knowingly withheld information from the EEO Management Respondent Information Fact Sheet that requires the manager to divulge if they had ever been identified as a discriminating official (identified in E. above).

H. plaintiff alleges that the Agency and EEO Officials collaborated to omit, reword, drop, and change EEO issues so that they could be successfully defended against.

## TEXT OF WRIT PETITION

**Preface to Text of Writ Petition:**

On 25 February 2004 the Clerk of the Supreme Court Of The United States sent the Plaintiff a letter and returned 39 of 40 copies of the Plaintiff's Petition For Writ Of Certiorari for failing to comply with the Rules of the Court. Specifically, according to the letter, the Court refused to accept the Plaintiff's Petition For Writ Of Certiorari because it was formatted in an 8½" X 11" paper booklet format instead of in booklet format on paper that measured 61/8" X 9¼". The U.S. Supreme Court Clerk also cited that "The Rules of the Court make no provision for filing a CD-Rom" in response to CD-Roms that the Plaintiff had attached to each of the 40 copies of the Writ that was sent to the Court and that was also attached to three copies of the Writ that the Plaintiff provided to the U.S. Attorney representing the Defendant Navy Agency. The CD-Roms contained document files pertinent to the Plaintiff's case including the findings and

conclusion of the Equal Employment Opportunity Commission Hearing Examiner (a.k.a. EEOC Administrative Judge) (dated 17 October 1994) regarding an administrative hearing on 19 & 20 July 1994. Other files on the CD-Rom include the Plaintiff's rebuttal response with exhibits to rebut the 17 October 1994 findings and conclusion of the 19 & 29 July 1994 administrative hearing. Plaintiff's rebuttal response was originally filed in hard-copy form in Ninth District Court on 22 June 2002 as PLAINTIFF'S RESPONSE TO DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES TO OPPOSE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT after the Plaintiff realized that the Defendant was relying on the biased and capricious 17 October 1994 findings/conclusion to dismiss the Plaintiff's case and deny the Plaintiff due process for a trial de novo. On 5 July 2002, the Court struck the rebuttal response and exhibits from the record because the Plaintiff failed to request the Court's permission prior to filing the rebuttal response. The basis of the Plaintiff's appeal involves the exclusion of evidence by the EEOC hearing examiner in determining his findings and conclusion. The Plaintiff's text within his returned Petition for Writ of Certiorari was written to rely on the same files and exhibits that were filed and stricken in the lower Court and which were presented in hard-copy to the appeals Court and which were presented on the CD-Rom to the U.S. Supreme Court. The Plaintiff respectfully requests that the Court accept the following two files from the CD-Rom that have been reproduced in hard-copy for the Plaintiff's reformatted Petition For Writ Of Certiorari:

1) The EEOC 17 October 1994 Findings and Conclusion of the 19 & 20 July 1994 Administrative Hearing (within appendices of judgments sought to be reviewed), and

2) Plaintiff's Rebuttal Response to the EEOC 17 October 1994 Findings and Conclusion, which is presented without supporting exhibits as a supplemental excerpt of record.

**Text supporting Question # 1: Did the EEOC hearing examiner commit harmful error by excluding evidence that adversely affected the substantial right of the complainant?**

Exclusion of evidence is considered harmful when such exclusions adversely affect a substantial right of the parties. See *DeMars v Equitable Life Assurance Society of the United States*, 610 F.2d 55, 61-62 (1st Cir. 1979) citing Fed. R. Civ. P.61 and Fed. R. Evid. 103(a). Therefore, in the evidentiary context, harmful error means that the erroneously excluded evidence would have caused the reviewing authority to reach a different result than that reached as a result of the exclusion of said evidence. See *Sheryl L. Loveland v Edward C. Aldridge Jr., Secretary, Department of the Air Force*, EEOC Petition No. 03880157 (December 1, 1988).

On 19 and 20 July 1994, an Equal Employment Opportunity Commission (EEOC) hearing was held on four separate consolidated complaints that Plaintiff had filed between 17 March 1992 and 23 March 1993. The issues within Plaintiff's Case Description and within Plaintiff's EEOC Complaints History were the issues before the EEOC hearing examiner. Plaintiff had identified his second-line supervisor, Bruner, and immediate supervisor, Johns, as discriminating officials. Prior to the hearing the EEOC Hearing Examiner (a.k.a. Administrative Judge), Cosentino, issued a Pre-hearing Report and Order concerning issues that were modified *at Cosentino's request*. The three modified issues delineated within

Cosentino's 22 June 1994 Pre-Hearing Report and Order are the *only* issues that Plaintiff conceded to "modify." Plaintiff's agreement did not involve any voluntary withdrawal of issues that were before EEOC Hearing Examiner Cosentino. Plaintiff's agreement pertained only to the three issues that are mentioned within Cosentino's Pre-Hearing Order and Report. Specifically, Plaintiff agreed to the following: (1) that Plaintiff would not litigate the 1985 discrimination in hiring complaint against Bruner if the fact remained that Plaintiff gained his machinist's position only after Plaintiff agreed to drop his 1985 discrimination complaint (that named Bruner as a discriminating selecting official) in exchange for the position; (2) that Plaintiff would not attempt to litigate the case of another Hispanic employee, John Vigil, (who was also physically assaulted by a non-minority co-worker that Vigil had previously identified to Bruner as being hostile) in the workplace if the fact remained that both assaults occurred to show a background for a hostile workplace for minorities; and (3) that Plaintiff would not re-litigate several disciplinary actions that were enacted by Bruner within weeks of filing Plaintiff's first 1992 complaint (naming Bruner as a discriminating and retaliating official), if the fact remained that said disciplinary actions did occur, that Plaintiff prevailed in having those actions dismissed, and that those actions are ripe for claims of reprisal after filing discrimination complaints.

At the opening of the 19 July 1994 EEOC hearing Cosentino orally read through a long list of original issues and then claimed that the "complainant (Plaintiff) voluntarily withdrew several of the above accepted issues." Cosentino then cited his own "matters ultimately presented for disposition at the hearing."

Plaintiff hereby states for the record, just as Plaintiff has presented in lower courts, that the Plaintiff *never* made any agreement, orally or in writing, to voluntarily withdraw *any* other issues that would only water down Plaintiff's case of circumstantial discrimination. The issues for consideration at the hearing were set solely at the discretion of the hearing examiner (Cosentino) and were not made by any agreement with Plaintiff's representative or with the Plaintiff.

On 17 October 1994, Cosentino released his findings and conclusion concerning the 19 & 20 July 1994 hearing. Cosentino "recommended no findings of discrimination and reprisal on all of the Complainant's allegations despite a wealth of documentation that was before him prior to the hearing, and despite damning testimony from the identified discriminating officials (IDOs), and despite findings of prima facie retaliation from an off-station EEO investigator, Art Alvarez (within 29 October 1993 report), and from the agency representative, Mark Commerford (within Agency's Proposed Findings of Fact and Conclusions of Law, that is located within the Agency's Post Hearing Brief dated 2 September 1994)." In his findings Cosentino ignored and superseded the written prima facie findings of reprisal by the Agency and also by an EEO investigator.

Within his written findings Cosentino painted Plaintiff in the most negative light possible while supporting the Agency's pre-text reasons for dismissing Plaintiff's discrimination and reprisal claims just as Cosentino had done with other valid EEOC cases at the same Navy Activity [Concord Naval Weapons Station, CA (CNWS)] (i.e. discrimination cases of Fred Gamble and John Vigil). EEOC Hearing Examiner Cosentino purposely skirted compensable issues during the hearing and within his

findings (e.g. Placing negatively altered performance appraisals within Plaintiff's personnel folder without Plaintiff's knowledge of the alteration or final signature). Cosentino ignored management directives (EEO-MD 110) violations where the HRO Personnel Manager, Deborah Eres, was also the Deputy EEO Officer. Cosentino ignored broken EEOC/Agency "make whole" agreements and foot-dragging by the Agency who withheld claims by simply ignoring them. The Agency made no attempts to rectify any of the Plaintiff's complaints after they were identified and could not stop the identified discriminating officials from escalating their reprisal after those EEO complaints were made. This outrageous situation is well documented and was before EEOC Hearing Examiner Cosentino, yet ignored for consideration in his findings and conclusion. Now the Navy Agency wants to dismiss claims for failure to exhaust administrative remedies as if the Agency ever intended to provide an administrative remedy for the Plaintiff. The Navy Agency and the EEOC Hearing Examiner, purposely whitewashed, downgraded, reworded, and omitted original issues of complaints so that they would not be considered or so they could be better defended and did so in order to subvert due process for the complainant. The facts in evidence rebut the credibility findings of the EEOC Hearing Examiner, Cosentino.

In *Redmon v Office of Personnel Management*, 05991100 (2000) the EEOC granted a request for reconsideration in finding that the decision contained a clearly erroneous interpretation of material fact as to the definition of the claims raised in the complaint, and an erroneous interpretation of the definition of a continuing violation.

One erroneous interpretation in this case pertains to the EEOC Hearing Examiner's findings that no evidence was presented to show that the assaults and batteries and hostilities upon Plaintiff by co-workers Schick and Parisi was predicated in any way on race or national origin. Under 29 C.F.R. § 1604.11 the Agency is responsible for acts of racial harassment in the workplace where the employer knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. The Plaintiff's original complaints concerning workplace hostilities never name the assailant coworkers (Schick and Parisi) as being racial in their actions. All complaints of racial hostilities are clearly directed at the identified discriminating officials (Bruner and Johns) and at the Navy Agency for failure to take prompt and appropriate corrective action to stop workplace violence and hostilities. Even after several EEO complaints had been lodged, the Navy did nothing to stop the continuing hostile conduct from Bruner and Johns who allowed multiple instances of assaults and batteries upon the Plaintiff. No such situation occurred with any non-minorities, yet such was the case with the only two Hispanics (John Vigil and Plaintiff, Manuel Cendejas Jr.) under second-line supervisor Bruner's authority. The evidence will show that the discriminating managers went as far as to support the hostilities by defending the non-minority assailants and by blaming the minority victims.

Another erroneous interpretation stems from EEOC Hearing Examiner Cosentino's findings that " . . . the Complainant has failed to establish a prima facie case of reprisal because the time interval between the alleged adverse action and the protected activity is too great to infer a retaliatory animus, and because no other evidence

of retaliatory intent has been presented on this record." In this instance Cosentino bases this finding strictly between Plaintiff's 1985 complaint and a 1993 complaint that changes were made (without Plaintiff's knowledge and after Plaintiff's final signoff) on Plaintiff's 1988-1989 performance appraisal and then placed into the Plaintiff's personnel file (Plaintiff would not find the changes to three separate performance appraisals until 1993). Cosentino totally ignores considering a multitude of disparate acts committed upon the Plaintiff by Johns and Bruner after the Plaintiff filed his first EEO complaint in 1992. Those acts include escalated hostilities and three wrongful disciplinary actions. Plaintiff felt forced to grieve the disciplinary actions through the Local Union because, though Plaintiff had initially sought to grieve the disciplinary actions within the Agency Activity's EEO process, there were no resources to mediate those disciplinary actions within the EEO process. EEO counselors were helpless to intervene. What "make whole" agreements that were made by the EEO counselors were ignored and broken by the Agency. Plaintiff felt sure that he would have been terminated from his career had Plaintiff not sought intervention using the Union grievance procedure. The ongoing situation became so outrageous and so severe as to cause the Plaintiff to develop an emotional condition that is recognized by the Department of Labor. In the midst of an emotional breakdown after many months of adversity and ignorance regarding these federal workplace issues the Plaintiff experienced a double-amputation workplace injury in 1995. The Navy's final act of retaliation was realized when the Navy controverted the 1995 injury claim causing the Plaintiff's compensation pay to be withheld for several months. Plaintiff refused to be subjected to further Agency animosity and filed for disability retirement

citing physical and emotional injuries related to the defined hostilities that were imposed by the discriminating/retaliating managers and by government handling of the case.

And so Plaintiff brings this case to the U.S. Supreme Court in this Writ of Certiorari to blow the whistle on this EEOC process that federal workers must rely upon in seeking due process for discrimination and reprisal. By the evidence submitted and by the Plaintiff's firsthand knowledge of the history of how these matters are mishandled the Plaintiff does not believe that he will ever receive fair consideration for his discrimination and reprisal complaints from the Agency or from the EEOC and the Plaintiff also feels that the Courts are turning a willfully blind eye to all of the facts in this matter.

Plaintiff prays that the U.S. Supreme Court will recognize that harmful error has been committed by excluding evidence that adversely affected the Plaintiff's substantial rights. Plaintiff's only request is that the Court remand this case back into District Court for a trial de novo before a jury of his peers to hear and decide his discrimination and reprisal claims.

**Text supporting Question # 2: Did the EEOC hearing examiner commit a procedural error by excluding evidence that adversely affected the substantial right of the complainant?**

The EEOC hearing examiner did not have the authority and discretion to dismiss several substantial claims at the opening of the Plaintiff's hearing.

Because the Plaintiff did not oppose said orally dismissed claims should not allow those claims to be forever barred for consideration. Plaintiff asks that the Court recognize his pro se status and emotional condition for failing to realize that those dismissed claims would be forever barred. Plaintiff's total focus was responding to the issues as directed by the EEOC Hearing Examiner.

**Text supporting Question # 3: Are the issues of the Plaintiff's claim so opprobrious and of such consequence to the overriding principle law and inconsistent with substantial justice as to warrant a reconsideration?**

Plaintiff respectfully asks the Court to consider *all* of the hard-copy and digital evidence that Plaintiff has provided to the Courts to make a determination based on the overriding importance of law, justice and due process. Plaintiff also asks that the Court consider the protection of all federal workers who need an unbiased process to grieve their discrimination and reprisal complaints.

Respectfully submitted,

Pro Se, MANUEL R. CENDEJAS JR.
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Pittsburg, CA 94565-3702
925-427-3013
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NO. 02-16875
CT/AG#: CV-00-02188-SBA

MANUEL R. CENDEJAS, JR.

Plaintiff-Appellant

v.

RICHARD J. DANZIG, Secretary of the Navy

Defendant-Appellee

(Filed Dec. 2, 2003)

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APPEAL FROM the United States District Court for the Northern Division of California (Oakland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern Division of California (Oakland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here-ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered July 24, 2003

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MANUEL R. CENDEJAS, JR.,

Plaintiff,

v.

RICHARD J. DANZIG, Secretary of the Navy,

Defendant. /

No. C 00-2188 SBA

**JUDGMENT**

(Filed Jul. 29, 2002)

In accordance with the Court's Order Granting Defendant's Motion for Summary Judgment,

IT IS HEREBY ORDERED THAT final judgment shall be entered in favor of defendant, Richard J. Danzig, Secretary of the Navy.

IT IS SO ORDERED.

/s/ Saundra B. Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

Dated: July 25, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MANUEL R. CENDEJAS, JR.,
Plaintiff,
v.
RICHARD J. DANZIG,
Secretary of the Navy,
Defendant.
/

No. C 00-2188 SBA

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

(Filed Jul. 29, 2002)

[Docket Nos. 36, 56]

Plaintiff, Manuel R. Cendejas, Jr. ("plaintiff"), a Latino male formerly employed as a machinist with the United States Navy, brings the instant action *pro se* against defendant, Richard J. Danzig, Secretary of the Navy ("defendant"), alleging claims for employment discrimination and retaliation pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq., and for emotional distress under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, et seq. The Court has original jurisdiction over plaintiff's claims under 28 U.S.C. § 1331.

The parties are presently before the Court on defendant's Motion for Summary Judgment, pursuant to Federal Rule of Civil Procedure 56. Having read and considered the papers submitted, and being fully informed, the Court GRANTS the motion.[1]

[1] The instant matter is suitable for disposition without a hearing. Fed. R. Civ. P. 78.

## BACKGROUND

### A. Factual Summary

In or around 1985, plaintiff applied for a position as a Machinist, Grade WG-11, at the United States Navy Public Works Department at the Concord Naval Weapons Station. Plaintiff was not selected for the position, and as a result, he complained to Equal Employment Opportunity ("EEO") counselors that his non-selection was discriminatory. The matter was resolved informally and plaintiff was hired. He worked in that capacity until January 1993, at which time the Public Works Department became part of the Navy Public Works Center ("PWC"), which is a separate entity. Plaintiff continued working for the Navy until around June 1995, when he took a disability retirement due to an industrial accident.[2]

During his tenure with the Navy, plaintiff reported to Al Johns ("Johns") and Pat Day who, in turn, reported to the general foreman, Robert Bruner ("Bruner"). Unfortunately, plaintiff's relationships with his supervisors and co-workers were not positive. In particular, plaintiff was involved in a number of incidents with Michael Schick ("Schick"), a piper [sic] fitter, and Michael Parisi ("Parisi"), a fellow mechanic. According to plaintiff, from 1987 through July 30, 1992, he and Schick were involved in a number of altercations of a physical and verbal nature. As to Parisi, he and plaintiff had a verbal altercation, and on July 30, 1992, Parisi allegedly "mule-kicked" him while he was using the telephone.

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[2] The industrial accident is unrelated to the claims at issue in this action.

Plaintiff claims that supervisors Bruner and Johns knew of these incidents but failed to properly investigate and prevent them, and instead, blamed plaintiff for instigating the conflicts. In addition, Bruner also allegedly altered the contents of plaintiff's personnel file by modifying a 1988-1989 performance appraisal, failing to place a complementary letter in the file, and placing pending disciplinary actions in his file. In 1992, Bruner told a Navy security officer that plaintiff was "mentally unstable" and an EEO Investigator that he was "mentally ill". In addition to Schick, Parisi, and Bruner, plaintiff also had issues with Johns, whom he accused of using the Spanish word "si" in a derogatory manner and giving him a "minimally satisfactory" rating in September 1992.

On July 22, 1992, November 3, 1992, and August 4, 1993, plaintiff filed administrative EEO complaints with the Navy which alleged a litany of incidents which plaintiff claims were racially motivated and in retaliation for engaging in protected EEO activity. After the Navy investigated the complaints, plaintiff requested an EEO hearing. On July 19 and 20, 1994, EEOC Administrative Judge Thomas Cosentino ("Judge Cosentino") conducted a consolidated hearing on plaintiff's four complaints of discrimination.[3] Plaintiff appeared at the hearing with his attorney, Daniel Long. On October 17, 1994, Judge Cosentino issued a decision in which he recommended "findings of no discrimination or reprisal on all of the Complainant's allegations." (Saltiel Decl. Ex. 7 at 34.) On December 20, 1994, the Navy issued its Final Agency

[3] Two of the complaints were dated November 3, 1992.

Decision adopting Judge Cosentino's recommendations. On December 22, 1997, the EEOC affirmed the Navy's Final Agency Decision. The EEOC denied plaintiff's request for reconsideration on March 20, 2000.

## B. Procedural History

### 1. The Initial Complaint

On June 20, 2000, plaintiff commenced the instant action in this Court by filing a *pro se* "Employment Discrimination Complaint" against defendant. On March 5, 2001, the Court dismissed plaintiff's claims with leave to file an Amended Complaint. The Court informed plaintiff that he was required to allege facts demonstrating his exhaustion of administrative remedies as to each of his claims, and in accordance with Federal Rule of Civil Procedure 8(a), the Court instructed him to set forth a "short and plain" statement of each claim with allegations of fact showing that he is entitled to the relief he seeks.

### 2. The Amended Complaint

#### a. Claims

On March 29, 2001, plaintiff filed an Amended Complaint, in which he alleges a multitude of distinct incidents.[4] These allegations fall into one of four categories of

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[4] This document is entitled "Declaration of Manuel R. Cendejas, Jr. in support of Plaintiff's Amended Complaint and in opposition to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment." On April 3, 2001, the Court liberally construed this document as an Amended Complaint.

claims: (1) race and national origin discrimination; (2) race-based verbal and physical harassment contributing to a hostile work environment; (3) retaliation for engaging in protected EEO activity; and (4) intentional infliction of emotional distress.

Specifically, plaintiff alleges that defendant acted in a discriminatory manner in violation of Title VII based on the following incidents in which his supervisors failed to extend to him the same privileges as they did to his non-minority co-workers: (1) a less-qualified candidate was promoted; (2) supervisors failed on several occasions to investigate and punish attacks on him by non-minorities; (3) he was denied equal training opportunities, performance awards, duty assignments, overtime opportunities, workspace, access to shop tools, and enforcement of rules; and (4) non-minorities received lighter disciplinary action, or no disciplinary action, for the same incidents and for conducting personal business while on the job.

The Amended Complaint also alleges verbal and physical harassment on the basis of race as contributing to a hostile work environment under Title VII. This claim is premised on the following incidents: (1) his supervisor Johns used the Spanish word "si" repeatedly in a derogatory manner, even after plaintiff asked him to stop; (2) he was verbally assaulted on five occasions and physically assaulted on three occasions by co-worker Michael Schick; and (3) he had a verbal altercation with co-worker Michael Parisi and was kicked by Parisi.

In addition, plaintiff alleges that he was retaliated against in violation of Title VII for filing EEOC complaints in 1985, 1992, and 1993 based on the following incidents: (1) he was denied union representation in two employment

actions; (2) his performance evaluation was downgraded; (3) a letter of appreciation was withheld from his personnel file; (4) a "minimally satisfactory" performance evaluation was wrongly placed in his personnel file; (5) supervisors failed to investigate altercations between him and co-workers; (6) he was denied permission to see a physician after an alleged workplace assault; (7) his performance evaluation was altered after he signed it; (8) a supervisor suppressed third-party attempts to mediate a conflict between him and a co-worker; (9) a letter of caution and a letter of reprimand were wrongfully placed in his personnel file; (10) the Navy contested continued payment of benefits to him after a work-related injury; and (11) the Navy withheld and thereby delayed his EEOC complaint.

Finally, plaintiff alleges intentional infliction of emotional distress based on the following incidents: (1) a supervisor told EEOC investigators that plaintiff was the instigator of all conflicts and that he was "mentally ill"; (2) a supervisor told co-workers that plaintiff was "mentally unstable," "a trouble maker," "the cause and effect of trouble," "the cause and effect of the assault," "had to be restricted from base," was a "threat," was "subversive," and "had problems"; (3) a supervisor told front gate security not to allow him on base; (4) supervisors yelled at him four times; and (5) a former supervisor instigated and attempted to instigate conflicts between Cendejas and his new supervisor.[5]

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[5] Plaintiffs claim for intentional infliction of emotional distress is construed under the FTCA, since that statute "provides the exclusive remedy for torts committed by government employees in the course of

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**b. Dismissal of the Racial Harassment Claim**

Defendant moved to dismiss the Amended Complaint on the ground that plaintiff failed to exhaust administrative remedies as to certain claims, and failed to state a claim as to others. Plaintiff failed to file an opposition to the motion. Although the Court could have dismissed the action based on plaintiff's lack of opposition, the Court chose to proceed with a decision on the motion on the merits. At the June 19, 2001, law and motion hearing, defendant withdrew its motion in part and submitted for the Court's consideration its argument that plaintiff failed to state a claim for racial harassment giving rise to a hostile work environment.

On June 20, 2001, the Court issued a written Order granting defendant's motion to dismiss. The Court dismissed plaintiff's racial harassment claim with leave to amend. The Court directed plaintiff to file a Second Amended Complaint by no later than July 11, 2001, and warned that the failure to timely amend the pleadings "will result in the dismissal of Cendejas's claims of racial harassment with prejudice." *See* Order at 8 (filed June 20, 2001). Plaintiff never filed a Second Amended Complaint.

**C. The Instant Motion**

Defendant now moves for summary judgment on all claims alleged in the Amended Complaint. Defendant contends that: (1) plaintiff's claims should be limited to

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their employment." *Miller v. United States,* 73 F.3d 878, 880 (9th Cir. 1995).

only those which he fully exhausted before the EEOC; (2) the racial harassment claim should be dismissed with prejudice based on plaintiff's failure to file a Second Amended Complaint; (3) the national origin discrimination claim fails because plaintiff cannot show the requisite "adverse employment action" which is necessary to establish a prima facie case of discrimination; (4) the retaliation claim fails based on plaintiff's failure to demonstrate an "adverse employment action" and that there is no evidence to establish a causal link between defendant's protected EEO activity and the allegedly retaliatory actions; and (5) the Court lacks subject matter jurisdiction over plaintiff's emotional distress claim given his failure to exhaust his administrative remedies under the FTCA. Plaintiff opposes the motion.

Following the close of briefing, plaintiff filed an additional declaration without prior leave of Court. In response, defendant has filed a Motion to Strike, which plaintiff also opposes.

## LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is warranted against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The party moving for summary judgment bears the initial burden of demonstrating the "absence of a genuine issue of material fact." *Id.* at 323. If the movant meets this burden, the nonmoving party must come forward with specific facts demonstrating a genuine factual issue for trial. *Matsushita Elec.*

*Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby, Inc,* 477 U.S. 242, 249 (1986). Thus, an opposition which fails to identify and reference triable facts is insufficient to preclude the Court's granting of a properly supported summary judgment motion. *See Nilsson Robbins, Dalgarn, Berliner Carson & Wurst v. Louisiana Hydrolec,* 854 F.2d 1538, 1545 (9th Cir. 1988) (per curiam). Nonetheless, any inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita,* 475 U.S. at 587.

## DISCUSSION

### A. Defendant's Motion to Strike

After the close of briefing and after the defendant filed his Reply memorandum, plaintiff filed a Reply Declaration on July 5, 2002, to which he attaches copies of what are ostensibly documents related to his EEO complaints. Defendant moves to strike the declaration on the ground that such document was filed in violation of Civil Local Rule 7-3(d), which provides that "once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval." Since plaintiff did not seek prior approval to file a Reply Declaration and has not otherwise demonstrated good cause to consider these documents, the Court GRANTS the motion to strike. *See Guam Sasaki Corp. v. Diana's, Inc.*, 881 F.2d 713, 715 (9th Cir. 1989) (holding that district courts have discretion in interpreting and applying their local rules). Nonetheless,

the Court's consideration of the declaration would not change the outcome of this motion, as plaintiff has failed to explain the significance of any of the documents attached thereto. *See Schneider v. TRW, Inc.*, 938 F.2d 986, 990-991 n.2 (9th Cir. 1991) ("the law of this circuit ... recognizes that a district court is under no obligation to mine the full record for triable issues of fact."); *see also Orr v. Bank of Am.*, 285 F.3d 764, 774 (9th Cir. 2002) (holding that the failure to provide specific citations warrants exclusion of evidence).

**B. Failure to Exhaust**

A federal employee must exhaust available administrative remedies as a jurisdictional prerequisite to initiating a federal employment discrimination action in a federal district court. *Brown v. General Servs. Admin.*, 425 U.S. 820, 832 (1976); *Vinieratos v. U.S., Dept. of Air Force Through Aldridge*, 939 F.2d 762, 768 (9th Cir. 1991). To properly exhaust a claim, the plaintiff must have first presented the claim in an EEOC complaint. *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990). The complainant must see his or her claim through fruition: "To withdraw is to abandon one's claim, to fail to exhaust one's administrative remedies." *Rivera v. U. S. Postal Serv.*, 830 F.2d 1037, 1039 (9th Cir.1987) (holding that a federal employee who opts to pursue administrative remedies cannot then "cancel" administrative proceedings and file a court action). Since Title VII places primary responsibility for enforcement of employment discrimination suits with the EEOC, *see Stache v. International Union of Bricklayers and Allied Craftsmen, AFL-CIO*, 852 F.2d 1231, 1233 (9th Cir. 1988), and "an administrative exhaustion rule is meaningless if claimants may ... abandon the administrative

process and yet still be heard in the federal courts," *Vinieratos*, 939 F.2d at 772.

The threshold question presented is whether plaintiff's discrimination and retaliation claims are limited to those which he did not abandon in the EEO proceedings. Defendant contends that prior to the hearing before EEOC Judge Cosentino, plaintiff voluntarily withdrew all but eleven allegations of discrimination and retaliation, and that the remaining allegations are the only exhausted claims which may be litigated in this action. The record supports this contention. In his written decision, Judge Cosentino made a specific finding to this effect, stating that: "Prior to the commencement of the hearing, complainant voluntarily withdrew several of the above accepted issues. Accordingly, only the following matters were ultimately presented for disposition at the hearing: . . ." (Saltiel Decl. Ex. 7 at 2.) The judge then specified the issues remaining for adjudication. (*Id.*)[6]

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[6] The matters expressly submitted for disposition to Judge Cosentino consist of the following: (1) whether plaintiff's supervisor, Johns, used the Spanish word "si" in a derogatory manner because of plaintiff's national origin; (2) whether plaintiff was subjected to a pattern of verbal and physical assaults and threats by coworkers which management ignored; (3) that in reprisal for his EEO activities, Bruner failed to investigate an incident which occurred on July 30, 1992, in which Parisi kicked him; (4) that the agency failed to take disciplinary action against Schick and Parisi for physically assaulting him; (5) that Hispanic employees were charged with misconduct even though they were the victims of misconduct; (6) that the agency did not discipline Schick and Parisi for working on personal business on government time; (7) that the agency refused to allow plaintiff to have a tool chest in the machine shop in 1993; (8) that Bruner made changes to plaintiff's 1988-1989 performance appraisal, after he had signed it; (9) that Johns deleted his comments requesting feedback from his performance appraisal

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Neither plaintiff nor his attorney disputed the judge's finding. Similarly, in his administrative appeal of Judge Cosentino's decision, plaintiff did *not* challenge the judge's specification of issues. (Saltiel Reply Decl. Ex. 2.) Nevertheless, in this action, plaintiff now "vehemently denies" having withdrawn those claims and asserts that "any suggestion" by Judge Cosentino to the contrary demonstrates his "bias" and "capricious" behavior in favor of the Navy. (Pl.'s Opp'n at 17-18.) However, beyond his own conclusory and unsubstantiated assertions, plaintiff fails to present any evidence to support his position. *See Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data").

In contrast, the record presented confirms plaintiff's abandonment of certain of his claims. As noted, at the hearing where plaintiff and his attorney, Daniel R. Long, were present, Judge Cosentino commenced the hearing by articulating on the record the specific issues which were to be addressed. (Saltiel Reply Decl. Ex. 1 at 25:24-28:13.) There is no evidence that either plaintiff or his counsel objected to or otherwise took exception to the Judge's recitation of the issues. In addition, following Judge Cosentino's adverse ruling, plaintiff appealed his decision to EEOC's Office of Federal Operations. (*Id.* Ex. 2.) Nowhere in that appeal did plaintiff contend that Judge

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because of his national origin; (10) that a "minimally satisfactory" performance appraisal for the rating period ending in September 1992 was placed in his personnel file without his signature or review; and (11) that Bruner made comments to a security officer and an EEO investigator in retaliation for his EEO activities. (Saltiel Decl. Ex. 7 at 1-2.)

Cosentino had misstated the issues remaining for adjudication. Thus, the Court concludes that the only claims which remain for determination in this action are those which plaintiff exhausted before the EEOC.

### C. Racial Harassment Claim

As discussed, on June 19, 2001, the Court dismissed plaintiff's racial harassment claim with leave to amend. The Court ruled that plaintiff's allegations failed to state a claim because, *inter alia* there were *no facts alleged suggesting that any of defendant's actions were racially motivated*. Order at 7 (filed June 20, 2001). Further, the Court found that while defendant's purported use of the Spanish word "si" "may be offensive, a 'mere offensive utterance,' without more, is insufficient to give rise to a hostile work environment claim based on racial or national origin harassment." *Id.* The Court granted plaintiff leave to amend to correct the deficiencies articulated by the Court:

> Cendejas may file a Second Amended Complaint not later than ***July 11, 2001.*** In preparing his Second Amended Complaint, he is reminded to set forth separately a "short and plain" statement of each claim he alleges, together with allegations of fact showing that he is entitled to the relief he seeks. By allegations of fact, the Court means that Cendejas should identify the conduct or events that give rise to the claim, when the alleged conduct or events occurred, who engaged in or performed any relevant conduct and why they did so, and what the resulting damages were, if any, to him. Cendejas is reminded that he should allege facts only if he can do so in good faith. His Second Amended Complaint must be a self-contained document containing each of his claims

> and allegations. *Any claims or allegations not set forth in his Second Amended Complaint will be deemed abandoned. Failure to file a Second Amended Complaint as described herein will result in dismissal of Cendejas's claims of racial harassment with prejudice.*

*Id.* at 8 (filed June 20, 2001) (emphasis added). Plaintiff never filed a Second Amended Complaint. Thus, the Government contends that given plaintiff's failure to do so, his racial harassment claims should now be dismissed with prejudice in accordance with the Court's prior Order.

The Court has the discretion to dismiss a complaint or claims with prejudice under Federal Rule of Civil Procedure 41(b) where the plaintiff fails to amend the complaint as directed. *See Yourish v. California Amplifier,* 191 F.3d 983, 986 (9th Cir. 1999) ("Under Ninth Circuit precedent, when a plaintiff fails to amend his complaint after the district judge dismisses the complaint with leave to amend, the dismissal is typically considered a dismissal for failing to comply with a court order. . . ."). The decision of whether to dismiss a claim under Rule 41(b) is governed by consideration of five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's needs to manage its docket; (3) the risk of prejudice to defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives. *Ferdick v. Bonzelet,* 963 F.2d 1258, 1260 (9th Cir.1992). Although a disposition on the merits is certainly preferable, it is readily apparent in this case that the remaining factors strongly militate in favor of dismissing plaintiff's racial harassment claims with prejudice.

First, the expeditious resolution and the Court's need to manage its docket clearly favor dismissal. Trial is

presently scheduled for September 9, 2002. Discovery is now closed and the law and motion cut-off date has passed. Therefore, the revival of claims which plaintiff previously abandoned would necessitate rescheduling all pretrial dates at this late stage of the litigation and would unnecessarily delay the case and disrupt an already overburdened docket.

Second, dismissal of the racial harassment claims is appropriate to minimize the risk of prejudice to the defendant. This factor "is related to the plaintiff's reason for defaulting in failing to timely amend." *Yourish*, 191 F.3d at 990. In his Opposition, plaintiff's only response is that the defendant previously misconstrued his theory of this particular claim. (Pl.'s Opp'n at 19.) Plaintiff misses the point. The Court provided a detailed analysis and specific guidance on why the claim was legally deficient and what specific allegations plaintiff must include to cure such deficiency. *The Court also expressly warned plaintiff that the failure to file a Second Amended complaint would result in the dismissal of the claim – with prejudice.* Despite such explicit guidance, plaintiff failed to amend his claim to cure the deficiencies noted by the Court. Given plaintiff's inability to demonstrate that his neglect is excusable, the Court finds that plaintiff's "paltry excuse for his default on the [Court's] order indicates that there was sufficient prejudice to Defendants [such] that this factor also strongly favors dismissal." *Yourish*, 191 F.3d at 992.

Finally, the Court has considered less drastic alternatives to dismissing this claim with prejudice. The Court's Order of June 20, 2001, expressly notified plaintiff that the "[f]ailure to file a Second Amended Complaint as described herein will result in dismissal of Cendejas's

claims of racial harassment with prejudice." Order at 8 (filed June 20, 2001). Such warning is sufficient to demonstrate the Court's consideration of alternatives to dismissal. *See Ferdik,* 963 F.2d at 1262 ("a district court's warning to a party that his failure to obey the court's order will result in dismissal can satisfy the 'consideration of alternatives' requirement.") (citation omitted); *see also McHenry, v. Renne,* 84 F.3d 1172, 1178 (9th Cir. 1996) (noting that the court need not exhaust all possible alternatives before dismissing an action).[7] Thus, based on the record presented, the Court finds that upon consideration of the *Ferdick* factors, dismissal of plaintiff's racial harassment claim with prejudice is appropriate.

Alternatively, even if his racial harassment claim were not subject to dismissal under Rule 41(b), the Court finds that plaintiff has otherwise failed to raise a genuine issue of material fact with respect to this claim. Although plaintiff's workplace may have been tense and at times unpleasant, there is absolutely no evidence that any of the conduct alleged by plaintiff was on account of his race or national origin. *See Steckl v. Motorola, Inc.,* 703 F.2d 392, 393 (9th Cir. 1983) ("Steckl's mere assertions that Motorola had discriminatory motivation and intent in failing to promote him were inadequate, without substantial factual evidence, to raise an issue precluding summary judgment."). Plaintiff's subjective and conclusory assertions of racial animus are insufficient to raise a genuine

[7] The Court also notes that it did not dismiss the action in its entirety notwithstanding plaintiff's failure to oppose defendant's prior motion to dismiss. Such action further evidences the Court's consideration of less drastic sanctions.

issue of material fact to avoid summary judgment. *Taylor,* 880 F.2d at 1045.

### D. National Origin Discrimination

#### 1. Legal Framework

Plaintiff's national origin discrimination claim under Title VII is premised on a theory of disparate treatment in the workplace. In order to establish such a claim, plaintiff must establish that defendant "intended to discriminate against him in the dismissal." *Jurado v. Eleven-Fifty Corp.,* 813 F.2d 1406, 1409 (9th Cir. 1987). Plaintiff bears the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). In this regard, plaintiff must offer either direct evidence of discriminatory intent, *see Trans World Airlines v. Thurston,* 469 U.S. 111, 121 (1985), or produce circumstantial evidence which creates an inference of discrimination, *McDonnell Douglas,* 411 U.S. at 802. In either event, plaintiff must adduce "specific facts" to establish his case; "purely conclusory allegations of discrimination, with no concrete, relevant particulars, will not bar summary judgment." *Forsberg v. Pacific Northwest Bell Tel. Co.,* 840 F.2d 1409, 1419 (9th Cir. 1988).

The proper legal framework for determining whether plaintiff's claim should survive summary judgment is the familiar burden-shifting scheme set out in *McDonnell Douglas.* The plaintiff must first establish a prima facie case of racial discrimination. *McDonnell Douglas,* 411 U.S. at 802. In particular, he must show that (1) he belongs to a protected class, (2) he was qualified for the position, (3) he was subjected to an adverse employment action, and (4)

similarly situated non-white individuals were treated more favorably. *See St. Mary's Honor Qtr. v. Hicks,* 509 U.S. 502, 506, (1993); *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 891 (9th Cir. 1994).

Once the plaintiff has advanced a prima facie case of discrimination, "the burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action." *Chuang v. University of Calif. Davis, Bd. of Trustees,* 225 F.3d 1115, 1123 (9th Cir. 2000). If the defendant makes this showing, the burden shifts back to the plaintiff to establish that the employer's actions were a pretext for discriminatory conduct. *Id.* However, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept.* of *Comm. Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

**2. Analysis**

Defendant acknowledges that plaintiff meets the first two prongs of the *McDonnell Douglas* test (i.e., that he belongs to a protected class and was qualified for the position), but argues that his national origin claim fails because he cannot show the requisite "adverse employment action." An adverse employment action is one which materially affects the aggrieved employees compensation, terms, conditions, or privileges of employment. *See* 42 U.S.C. § 2000e-2(a)(l); *Chuang,* 225 F.3d at 1125. Plaintiff concedes that the disciplinary actions were "rescinded" through the union grievance process, but contends that the rescinded actions nonetheless "emotionally damaged [him]" and resulted in "changes" to his employment status.

(Pl.'s Opp'n at 8, 22; Pl.'s Depo. at 93:14-94:2.) In particular, plaintiff characterizes these alleged changes as follows:

> [A]s a result of poisoning the plaintiff's position with his new managers during a workplace realignment, the machinist plaintiff was: 1) displaced from the machine shop and into the Utilities Division where the defendant worked with high voltage electricians, heavy equipment operators, and underground water, gas, and sewer mains, 2) ordered to take his machinist tools home indicating to the plaintiff that he would no longer be working as a machinist within the machine shop, and 3) displaced from Concord Naval Weapons Station to Mare Island and had to seek local union assistance to return.

(Pl.'s Opp'n at 21:27-22:6.) This argument fails on several levels. First, the "changes" referenced by plaintiff have not heretofore been raised in this action nor has he exhausted his administrative remedies with respect to these allegations. As such, the alleged changes are "not sufficiently final to constitute an adverse employment action." *Brooks v. City of San Mateo,* 229 F.3d 917, 930 (9th Cir. 2000) (holding that plaintiff's abandonment of her administrative appeal of a negative job evaluation foreclosed that evaluation from being considered as an adverse employment action because it could have been changed on appeal). Second, plaintiff fails to provide any evidence or citations to the record to support these contentions. *See Orr*, 285 F.3d at 774 (holding that on a motion for summary judgment, the litigant must provide specific citations to the record). Finally, even accepting these allegations at face value, there is no evidence from which it could be

inferred that these changes materially affected the compensation, terms, conditions and privileges of his employment.

Next, plaintiff argues that he was "constructively discharged" as a result of defendant's conduct. (Pl.'s Opp'n at 23:1-4.) This allegation is not contained in the Amended Complaint, and therefore, is not properly before the Court. *Armstrong v. Reno,* 172 F. Supp. 2d 11, 20 (D.D.C. 2001) ("plaintiffs claim of constructive discharge, alleged for the first time in plaintiff's opposition to defendant's motion for summary judgment, should be dismissed because it was not alleged in plaintiff's complaint."); *c.f.*, *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (holding that claims not realleged in an amended pleading are deemed waived). Moreover, plaintiff's claim of constructive discharge is belied by his own deposition testimony in which he testified under oath that he was retired by the Navy as a result of a work-related injury. (Pl.'s Depo. at 21:-22:16, 96:5-7.)[8] Given plaintiff's failure to demonstrate that he suffered any adverse employment action, the Court GRANTS defendant's motion for summary judgment as to plaintiff's racial harassment claim.

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[8] Plaintiff also cites the findings of an EEOC investigator that he had established a prima facie case of discrimination on the basis that he is Mexican-American. (Pl.'s Opp'n at 21:21-22.) Such "finding" is insufficient to generate an issue of material fact. Aside from plaintiff's failure to cite to the record, he has not provided any information regarding the basis for the investigator's purported finding. Moreover, since the EEOC ultimately rejected plaintiff's claims, the investigator's findings are of dubious value.

## E. Retaliation

### 1. Overview

Title VII prohibits employers from retaliating against employees for engaging in protected EEO activity. 42 U.S.C. § 2000e-3(a); *Washington v. Garrett,* 10 F.3d 1421, 1435 (9th Cir. 1994). To establish a prima facie case of retaliation, a plaintiff must show that "(1) he engaged in statutorily protected activity; (2) he suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action." *EEOC v. Dinuba Med. Clinic,* 222 F.3d 580, 586 (9th Cir.2000) (internal quotation marks omitted). An action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in a protected activity. *Ray v. Henderson,* 217 F.3d 1234, 1242 (9th Cir. 2000). "To show the requisite causal link, the plaintiff must present evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *Cohen v. Fred Meyer, Inc.,* 686 F.2d 793, 796 (9th Cir. 1982).

### 2. Evidence of Retaliation

#### a. Failure to Investigate

In the instant case, plaintiff cites several employer actions as evidence of retaliation.[9] None is sufficient to survive summary judgment. First, plaintiff alleges that defendant retaliated against him for engaging in protected

[9] Defendant acknowledges that plaintiff's request for EEO counseling in 1985 is sufficient to establish that plaintiff engaged in protected EEO activity. (Def.'s Opp'n at 13.)

EEO activity when Bruner failed to investigate the July 30, 1992 incident in which Parisi "mule-kicked" him. (Am. Compl. at 4.) However, plaintiff presents no evidence to support this contention or to otherwise create an inference that Bruner's conduct was causally connected to plaintiff's protected EEO activity. Plaintiff's failure to do so is fatal to his claim. *See Nilsson,* 854 F.2d at 1545 ("In the absence of specific facts, as opposed to allegations, showing the existence of a genuine issue for trial, a properly supported summary judgment motion should be granted").

**b. Personnel Files**

Next, plaintiff complains that Bruner altered his 1988-89 performance appraisal after he signed it by downgrading him from an "outstanding" to a "highly satisfactory" rating. (First Am. Compl. at 7; Pl.'s Depo. at 78:1-7.) Although a negative performance appraisal can potentially deter employee protests, the performance review at issue was neither below average nor did it result in any other negative consequences. *See Kortan v. California Youth Auth.,* 217 F.3d 1104, 1113 (9th Cir. 2000). Moreover, plaintiff has failed to adduce any evidence that the "highly satisfactory" rating was "clearly undeserved or a large departure from past reviews." *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1285 n.7 (9th Cir. 2001).

In any event, even if such conduct were reasonably likely to deter plaintiff from engaging in protected activity, it is *too remote* to establish the requisite causal connection. "[I]n order to support an inference of retaliatory motive, the termination must have occurred fairly soon after the employee's protected expression." *Villiarimo v. Aloha Island*

*Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002); *Clark County District v. Breeden*, 532 U.S. 268, 273-74 (2001) ("temporal proximity must be 'very close,'"). In this case, plaintiff engaged in the protected EEO activity in 1985, and the alteration of the performance appraisal did not occur until around October 1989. (Pl.'s Depo. at 77:2-12.) Thus, the Court finds that the *four-year* time interval between the protected EEO activity and alteration of the performance appraisal is too great to justify an inference of retaliation. *See Villiarimo*, 281 F.3d at 1064 ("A nearly 18-month lapse between protected activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation.").

In addition to the above, plaintiff characterizes as retaliatory a September 1992 performance appraisal in which he received a "minimally satisfactory" rating by Johns. (Am. Compl. at 7; Pl.'s Depo. at 83:23-25.) However, at his deposition, plaintiff admitted that this rating was not an overall rating, but merely pertained to "one element" of the evaluation. (Pl.'s Depo. at 84:13-17.) Notably, plaintiff could not recall to which element the rating pertained nor did he have any recollection of the time-period which the review covered. (*Id.* at 84:15-21.) In short, there simply is no evidence that the "minimally satisfactory" rating on one element of the September 1992 appraisal was unwarranted. *See Winarto*, 274 F.3d at 1285 n.7.

Plaintiff's remaining complaints regarding his personnel file are that Bruner purposely withheld a letter of appreciation from the United States Marine Corps from his personnel file and placed disciplinary actions into his personnel file while those grievances were pending. (First Am. Compl. at 7, 19; Pl.'s Depo. at 85:5-21.) Again, neither

of these are the types of incidents reasonably likely to deter employees from engaging in protected activity. *See Ray*, 217 F.3d at 1242.[10] It is also readily apparent from plaintiff's deposition testimony that he has no personal knowledge of the reasons why the letter was withheld from his file. (Pl.'s Depo. at 82:6-12.) The Court concludes that none of the matters raised by plaintiff concerning his personnel file and performance appraisals is sufficient to raise a genuine issue of fact regarding his retaliation claim.

### c. Derogatory Remarks

Finally, plaintiff claims that Bruner made comments to a security officer and an EEO investigator that plaintiff was "mentally ill" and "mentally unstable." (Am. Compl. at 5-6.) However, "badmouthing an employee outside the job reference context [does] not constitute adverse employment action[]." *Brooks*, 229 F.3d at 929; *accord Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3rd Cir. 1997) ("allegations that [plaintiff] was subjected to 'unsubstantiated oral reprimands' and 'unnecessary derogatory comments' following her complaint do not rise to the level of the 'adverse employment action' required for a retaliation claim."). Moreover, there is no evidence suggesting that these comments were in retaliation for plaintiff's EEO activity. At bottom, the Court finds that plaintiff has failed to raise any genuine issues of fact sufficient to avoid

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[10] It is also noteworthy that the pending disciplinary actions were admittedly subject to modification, and therefore, were sufficiently "final" to establish an adverse employment action. *See Brooks*, 214 F.3d at 1094.

summary judgment on his claim for retaliation under Title VII.

### F. Intentional Infliction of Emotional Distress

The United States, as sovereign, may not be sued without its consent, and the terms of consent define the district court's jurisdiction to hear the suit. *United States v. Testan,* 424 U.S. 392, 399 (1976). The FTCA provides a limited waiver of sovereign immunity and permits recovery against the United States for tortious conduct by federal employees that occurs within the scope of their employment. *See* 28 U.S.C. §§ 2401, 2674. To maintain an action under the FTCA, however, a claimant first must file an administrative claim with the appropriate federal agency. *See* 28 U.S.C. § 2675. This requirement is jurisdictional. *Caidin v. United States,* 564 F.2d 284, 286 (9th Cir. 1977).

Plaintiff concedes that he failed to present an administrative tort claim as required by the FTCA, but seeks leave to do so now. (Pl.'s Opp'n at 24.) This request is denied. As a threshold matter, granting plaintiff leave to exhaust his FTCA claim at this late stage of the litigation would require modification of the Court's pretrial order, including rescheduling the trial date. Since plaintiff has not demonstrated good cause for his failure to exhaust this claim earlier, such request is denied. *See Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 609 (9th Cir.1992) (discussing standards applicable to requests governed by Federal Rule of Civil Procedure 16).

In addition, granting plaintiff leave to exhaust his claim is futile. The FTCA provides that a tort claim is "forever barred" unless it is presented within two years

after the claim accrues. 28 U.S.C. § 2401(b). Moreover, plaintiff's emotional distress claim is an intentional tort to which the FTCA's waiver of sovereign immunity is inapplicable. *See Orsay v. United States Dept. of Justice*, 289 F.3d 1125, 1135 (9th Cir. 2002) (holding that 28 U.S.C. § 2680(h) bars Appellants' FTCA claims that [defendant's] conduct constituted assault and intentional infliction of emotional distress.") The Court therefore dismisses plaintiff's intentional infliction of emotional distress claim for lack of jurisdiction.

## CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT defendant's Motion to Strike Declaration [Docket No. 56] is GRANTED. Plaintiff's Reply Declaration [Docket No. 53], filed July 5, 2002, is STRICKEN from the record. The Clerk shall remove said item from the Docket and return the original response to the plaintiff by U.S. Mail.

IT IS FURTHER ORDERED THAT defendant's Motion for Summary Judgment [Docket No. 36] is GRANTED. The Clerk shall close the file and terminate any pending matters on the docket.

IT IS SO ORDERED.

Dated: July 25, 2002

/s/ Saundra B Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
**SAN FRANCISCO DISTRICT OFFICE**
**901 MARKET STREET, SUITE 500**
**SAN FRANCISCO, CA 94103**

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| COMPLAINT OF<br>Manuel R. Cendejas<br>298 Davi Ave.<br>Pittsburg, CA 94565<br>Complainant,<br>and<br>Marvin Runyon<br>Postmaster General of the<br>U.S. Postal Service<br>Respondent Agency | **EEOC CASE NO.**<br>**370-94-X2450, X2451, X2452 & X2453**<br>**AGENCY NO.:**<br>**DON-93-60036-010 & DON-93-60036-015**<br>**DATE:** June 22, 1994 |

## PRE-HEARING REPORT AND ORDER

Pre-Hearing conferences in the above-captioned case were held on June 7 and June 16, 1994. Daniel R. Long appeared on behalf of the complainant and Mark Commerford appeared on behalf of the Agency. The following matters were discussed and/or ruled upon:

## I. ISSUES

The parties agreed that the issues remaining for disposition before me are set forth in complainants' submission of June 14, 1994 (attached), with the following modifications:

1. Item a.i. (the alleged 1985 non-selection of the complainant for the position which he presently occupies) will not be ruled upon at the hearing because it is not an

accepted issue and is unrelated to the remaining allegations that were accepted. With the exception of referring to this matter briefly as background information, no evidence will be taken on this matter.

2. As to item v.B. (the reference to Mr. Vigil as another Hispanic employee who was an alleged victim of a physical assault), the parties are reminded that Mr. Vigil has already presented his case at a hearing and I will not allow a re-litigation of that matter.

3. The complainant will not be allowed to present evidence concerning the matters raised in Item viii. (concerning several disciplinary actions taken against the complainant), except for a stipulation indicating the nature of those disciplinary actions, that they occurred, and the final outcome thereof, because the complainant made an election of remedies to pursue these matters through the grievance process.

## II. Witnesses

The following witnesses were approved to appear on behalf of the complainant:

Al Johns
Bob Bruner
Rich Arnold
Pat Day
CWO Johnson
Russell Maynard
Ray Pietrich
Paul Rankin
Mike Rogers
Lamar Wright
Fred Gamble
Michael Parisi
Michael Schick.

The complainant originally submitted a witness list that I deemed to be overly repetitive and cumulative, and which he was ordered to revise. Complainant then filed a revised witness list in compliance with my order, which list I revised further during a pre-hearing conference which was held before complainant was represented by counsel and when the matter was originally scheduled for hearing in December, 1993.[1] As a result of this revision the following witnesses were not approved because they would provide repetitive testimony (Don Coone, Rod Raines, Pam Ramirez, Frank Sturgis and Terry Wright).

Based on my discussions with the parties concerning the issues accepted, complainant withdrew his request for witnesses P.O. Gargin and Harold Hinton, concerning their purported testimony that they provided false and biased information by agency managers in an effort to sway an investigation and/or infer negative character against the complainant.

The following witnesses were approved to appear on behalf of the agency:

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[1] This case was originally submitted to the EEOC for hearing in October, 1993. It was withdrawn without prejudice by stipulation of the parties on December 14, 1993, so that appropriate arrangements for the appearance of complainant's witnesses during normal duty hours could be made. The matter was re-submitted for a hearing on April 20, 1994, at which time the complainant was represented by counsel. My final ruling as to complainant's witnesses was made after the case was returned for a hearing in April 1994, when complainant counsel's was available to represent him. All my witness rulings were, therefore, made with the input of complainant's attorney.

Al Johns
Terisa Williams
Gary Wegener
Bob Bruner
Deborah Eres.

As a result of the elimination of several issues by the complainant during the June 16, 1994 pre-hearing (i.e. that complainant was not allowed to see his doctor; that he was not allowed to participate in the leave transfer program; and that his EEO complaint was not processed in an expeditious manner), the agency withdrew Rodolfo Palomino, Karen Koroknay and Alan Nibbs as witnesses.

## III. DISCOVERY PERIOD

The discovery period in this case has been extend until July 15, 1994, in light of the fact that the complainant has obtained a new representative.

## IV. HEARING DATES

The hearing dates have been changed to July 19 and July 20, 1994.

## V. SETTLEMENT

The agency has agreed to consider complainant's settlement request upon the submission of medical documents in support thereof.

/s/ Thomas Cosentino
Thomas Cosentino
Administrative Judge

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
**SAN FRANCISCO DISTRICT OFFICE**
**901 MARKET STREET, SUITE 500**
**SAN FRANCISCO, CA 94103**

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| COMPLAINT OF<br><br>Manuel R. Cendejas<br>298 Davi Ave.<br>Pittsburg, CA 94565<br><br>Complainant,<br><br>and<br><br>John H. Dalton<br>Secretary<br>Department of the Navy<br><br>Respondent Agency | **EEOC #**<br>**370-94-X2450, X245, X2452 & X2453**<br><br>**AGENCY #**<br>**DON-92-60036-010 & DON-93-60036-015** |

**COMPLAINANT'S REPRESENTATIVE:**

Daniel R. Long
Attorney at Law
78 Cernon St., Suite A
Vacaville, CA 95688

**AGENCY'S REPRESENTATIVE:**

Mark Commerford
Legal Counsel
Human Resources Office (Code L)
Naval Weapons Stations
10 Delta St.
Concord, CA 94520

**HEARING DATES:**

July 19 & 20, 1994

**HEARING PLACE:**
Naval Weapons Station
Concord, California

**ADMINISTRATIVE JUDGE:**
Thomas Cosentino

## I. INTRODUCTION

On July 19 and 20, 1994, a consolidated hearing was held on four complaints of discrimination filed by Manuel Cendejas (the complainant) against the United States Department of the Navy, Concord Naval Weapons Station (the agency).

Three of the complaints (370-94-X2450 through X2452) were consolidated for investigation by the agency before they were presented for a hearing. The issues accepted for processing by the agency in these cases were as follows: whether because of his national origin (Hispanic), the Complainant was subjected to physical and verbal assaults by co-workers, thereby denying him a safe work environment; was placed in a leave without pay status; was denied due process, the right to see his personal physician, training, overtime, supervisory assignments and access to shop equipment; and whether, because of his EEO activities, he was subjected to continual reprisal in the form of the suppression and cover up of facts concerning co-worker assaults he was the victim of (see IE:9 and 10 of agency complaint file DON 92-60036-010).

In complaint No. 370-94-X2454, the agency accepted the following issues for processing: whether the complainant's general foreman (Bruner) slandered him, falsified and tampered with government documents (i.e. his performance appraisals), continued to harass him, denied him fair and

equitable treatment and withheld pertinent information from his personnel files (i.e. a letter of appreciation), because of his national origin and his EEO activities (see IE:3 of agency complaint file DON 93-60036-015).

Prior to the commencement of the hearing, complainant voluntarily withdrew several of the above accepted issues. Accordingly, only the following matters were ultimately presented for disposition at the hearing: whether Complainant's immediate supervisor, Al Johns, used the Spanish word "si" in a derogatory manner in his presence because of his national origin; whether he was the subject of a pattern of verbal and physical assaults, batteries and threats by co-workers that management was aware of but ignored, thereby creating a hostile work environment because of his national origin; that in reprisal for his EEO activities general foreman Bruner failed to objectively investigate a July 30, 1992 incident in which co-worker Parisi kicked him; that the agency failed to take disciplinary action against Schick and Parisi for physically assaulting him; that Hispanic employees were charged with misconduct even though they were the victims of misconduct (i.e. the assaults he suffered at the hands of co-workers Schick and Parisi); that the agency did not discipline Schick and Parisi for working on personal business on government time; that the agency refused to allow him to have a tool chest in the machine shop in 1993; that general foreman Bruner made changes to his 1988-1989 performance appraisal after he had signed it, withheld a letter of appreciation from his personnel file, placed disciplinary actions into his personnel file while those actions were being grieved because of his EEO activities; that supervisor Johns deleted his comments requesting feedback from his performance appraisal

because of his national origin; that a minimally satisfactory performance appraisal for the rating period ending in September, 1992, was placed into his personnel file without his signature or review; and that Bruner made comments to a security officer and an EEO investigator to the effect that he was mentally ill, in retaliation for his EEO activities against him.

Complainant was represented at the hearing by his attorney, Daniel R. Long. Complainant testified on his own behalf and called the following witnesses: Bob Bruner, Richard Arnold, Pat Day, Ray Pietrick, Paul Rankin, Fred Gamble and Michael Schick.[1] Complainant's exhibits CE-1 and CE-2 were admitted in evidence.

The agency was represented at the hearing by its attorney, Mark Commerford, who called Gary Wegener and Bob Bruner as witnesses. Agency exhibits AE-1 through AE-8 were admitted in evidence.

## II. PROCEDURAL CHRONOLOGY

*Complaints 370-94-X2450, X2451 and X2452*

Complainant sought EEO counseling on March 17, 1992, October 1, 1992 and August 6, 1992. Counseling ended on June 26, 1992, and October 26, 1992. Complainant filed formal complaints on these matters on June 26 and October 26, 1992. The agency notified Complainant of his right to request a hearing on August 16, 1993, and the

[1] Michael Parisi was also approved as a witness for the Complainant and he was made available to appear. The Complainant, however, chose not to call him as a witness.

Complainant requested a hearing on September 16, 1993. The Agency requested the appointment of an EEOC Administrative Judge on October 6, 1993.

A hearing on these complaints was scheduled to begin in December, 1993, but the Complainant and the agency agreed to a withdrawal of Complainant's request for a hearing without prejudice, in order to accommodate the unavailability of some of Complainant's witnesses and to consolidate these complaints with case No. 370-94-X2453 (agency No. 93-60036-015) which was then under investigation (see Complainant's December 6, 1993 Request For Continuance and my December 14, 1993 Order Approving Agreement For Withdrawal of Request For A Hearing without Prejudice, both found before IE-1 of complaint file DON 93-60036-015).

*Complaint No. 370-94-X2453*

The procedural chronology for complaint 370-94-X2454 (agency No. DON 93-60036-015) is as follows: Complainant sought EEO counseling on March 22, 1993. EEO counseling ended on July 7, 1993, after three extensions agreed to by the complainant. A formal complaint was filed on August 5, 1993. The agency notified Complainant of his right to request a hearing on December 13, 1993. The complaint was formally consolidated with complaint Nos. 370-94-X2450 through X2453 and was submitted to the EEOC for a consolidated hearing, on April 20, 1994.

## III. APPLICABLE LAW

### Title VII

Section 717 of Title VII of the Civil Rights Act of 1964, as amended, (Title VII) forbids discrimination based on race, color, religion, sex or national origin in federal employment.

In any proceeding, either judicial or administrative, involving a charge of discrimination, it is the burden of the Complainant to initially establish that there is some substance to his/her allegation of discrimination. In order to accomplish this burden, the complainant must establish a *prima facie* case of discrimination. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Furnco Construction Co.* v. *Waters,* 438 U.S. 567 (1978). This means that the Complainant must present a body of evidence such that, were it not rebutted, the trier of fact could conclude that unlawful discrimination did occur.

The Complainant may prove a *prima facie* case with indirect, circumstantial evidence of discrimination by first introducing evidence that raises an inference that the agency's actions were discriminatory. One way to raise such an inference would be to prove that the Complainant was treated less favorably than similarly situated persons not within complainant's protected group.

If the Complainant meets his burden of presenting a *prima facie* case, then the agency has a burden of production to articulate nondiscriminatory reasons for its actions, and if the agency does so, the Complainant has the burden to demonstrate that the reasons articulated are, in actuality, a pretext for discrimination. The Complainant always maintains the ultimate burden of proving by a preponderance of

the evidence that an unlawful factor played a motivating part in the adverse employment actions complained of. *McDonnell Douglas Corp.* v. *Green, supra.*

**Reprisal**

Title 29, Code of Federal Regulations Section 1614.101(b) states:

> (b) No person shall be subject to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act (Title VII) (42 U.S.C. 2000e *et seq.),* the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 *et seq.)*, the Equal Pay Act (29 U.S.C. 206 (d)) or the Rehabilitation Act (29 U.S.C. 791 *et seq.)* or for participating in any stage of administrative or judicial proceedings under those statutes.

The principles developed in Title VII discrimination cases alleging disparate treatment as set forth above are applicable to actions for unlawful retaliation. *Cohen* v. *Fred Meyer, Inc.* 686 F.2d 973, 976 (9th Cir. 1982).

To raise an inference of discriminatory retaliation, a Complainant must show that: (1) he engaged in an activity protected under Title VII, the ADEA and/or the Rehabilitation Act; (2) the agency subjected him to an adverse employment action; and (3) there was a causal link between the protected activity and the agency's action. Causation sufficient to raise an inference of unlawful retaliation may be inferred from such factors as: the proximity in time between the protected activity and the alleged retaliatory action; evidence that the agency treated the employee differently from similarly situated employees who have not filed EEO complaints; and evidence that, after learning that the employee had filed an EEO complaint

and/or engaged in other EEO activity, the agency treated the employee differently than before he filed the EEO complaint and/or engaged in other EEO activity. *Miller* v. *Fairchild Industries, Inc.*, 797 F.2d 727 (9th Cir. 1986).

## IV. FINDINGS AND CONCLUSIONS

The Complainant was hired by the agency in 1985 as a machinist in the Public Works Department. He worked for the agency in that capacity until January, 1993, when the Public Works Department became part of the Navy Public Works Center, San Francisco Bay, an entirely different Navy entity.[2]

During his employment with the agency Complainant worked for three different immediate supervisors two of whom, Pat Day and Al Johns, are involved with some of the issues raised in these cases. Day and Johns both reported to Robert Bruner, the general foreman, and Complainant's second level supervisor during the relevant period of reference in this case. Complainant only names Johns and Bruner as the Responsible Officials in his several complaints (testimony of Cendejas).

Besides the EEO complaints described above which led to this hearing, the Complainant also filed an EEO complaint against general foreman Bruner in 1985, in which he alleged that Bruner had initially failed to hire him as a mechanic in favor of a friend. Complainant

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[2] Although Complainant became an employee of Navy Public Works, San Francisco, he continued to work at the Concord Naval Weapons Station.

testified that when he met with Bruner after he was hired for this job in 1985, Bruner told him that he wished he had not gone to EEO (testimony of Cendejas).[3]

Complainant performed his duties primarily in Work Center 40 (WC-40) located in building 15-A. Many other employees also worked in WC-40 or had office space there. Two such employees were Michael Schick, a plumber, and Michael Parisi, another mechanic, both of whom Complainant alleges subjected him to verbal and physical assaults, threats and harassment which created a hostile work environment because of his national origin which management ignored.

The primary focus of Complainant's case involves his allegations against Schick and Parisi and, in effect, constitutes a claim of ethnic based hostile environment discrimination.

It has been a long standing precept of Title VII law that employees are entitled to work in an atmosphere free from racial or ethnic harassment, and that a work atmosphere heavily charged with discrimination constitutes an unlawful employment practice. *Rogers* v. *EEOC,* 454 F.2d 234 (5th Cir. 1971), *cert denied,* 406 U.S. 957 (1972). See also the Commissions Guidelines on Discrimination Because of Sex at 29 C.F.R. 1604.11 (1992).

In order for a complainant to prevail on such a claim, there must be some showing that the conduct complained

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[3] Bruner, who does not recall making the statement about complainant going to EEO, testified that the Complainant had actually been hired two days before he went to the EEO office (testimony of Bruner).

of was based upon the employee's protected status under the law, here, complainant's Hispanic origin; that the conduct was excessive and opprobrious; or that reasonable steps were not taken by management to correct the conduct, or to prevent it from occurring, once it was aware of the nature of the challenged conduct. See *Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87,88 (8th Cir. 1977); *EEOC* v. *Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381 (D.C. Minn. 1980).

While it is commonly understood that an employer violates Title VII when it tolerates racially or ethnically offensive or derogatory language in the workplace, violations generally do not occur where the challenged conduct was isolated, casual, or sporadic; where there was an absence of hostility or racial animus; where the incidents were a result of the rowdy nature of the workforce; or where reasonable steps were taken to prevent it. *Powell* v. *Missouri State Highway and Transportation Department*, 822 F.2d 798 (8th Cir. 1987); *Rials* v. *Allstate Insurance Co.*, 45 FEP 33 (E.D. Mich. 1987); *Anderson* v. *Methodist-Evangelical Hospital*, 464 F.2d 723 (6th Cir. 1972)

As noted, Complainant's hostile environment allegation is predicated solely on his interactions with Schick and Parisi, both of whom he claims assaulted him and threatened him with bodily harm on numerous occasions, dating back to 1988.

The specific incidents that form the basis for this allegation are as follows: An October 14, 1988 incident in which Complainant says Schick bumped knees with him; a March 29, 1989 letter written by the chief union steward (Plosch) to general foreman Bruner on behalf of Parisi, in which Bruner is warned that if Parisi was provoked into

using physical force against the Complainant and civil action was taken against him, he (Parisi) would hold management responsible; a May 12, 1989 incident in the tool room in which Complainant alleges Schick told him to "stay away from the club or else"; a February 8, 1991 incident in which Schick allegedly struck Complainant on his back and told him to stay out of the "fucking way"; a February 19, 1991 incident in which Schick made threatening gestures towards the Complainant (i.e. making an obscene gesture towards him with his middle finger in the presence of supervisor Johns); a July 28, 1992 incident in the tool room in which Schick allegedly made death threats to him (i.e. "I am going to kick your ass, your ass is dead, you are history"); and a July 30, 1992 incident in which Parisi kicked him in the chest, causing him physical harm and loss of time at work.[4]

There is little or no dispute on the record that Schick and Parisi did not get along with the Complainant; that Schick, admittedly, does not like the Complainant; that Schick is known to be an aggressive, somewhat volatile person who is easily riled; that Schick often raised his voice and used profanity towards the Complainant; and that both were involved to one degree or another in the incidents Complainant describes above. However, there was absolutely no evidence presented to indicate that any of these incidents, or Complainant's obviously stormy

[4] As a result of the July 30, 1992 incident, Complainant left work and did not return for several months. During his absence the Complainant sought medical treatment for the physical injury caused by Parisi on July 30, 1992, as well as psychiatric consultations and treatment for the mental suffering he claims to have suffered because of the alleged harassment he complains of.

relationship with Schick and Parisi, was predicated in any way upon his race or national origin, or that Parisi and Schick harbored any racial animosity towards the Complainant whatsoever, notwithstanding their obvious dislike for him.

For example, at no time during Complainant's description of these incidents, either in his hearing testimony, during the course of the agency's EEO investigation, in his letters of complaint to management about his two nemeses, in documents he filed with the union concerning these matters, or in police reports he made concerning Schick's conduct towards him, does he even vaguely suggest that racial prejudice caused or provoked any of these incidents. Complainant does not even make a claim that Schick and Parisi ever uttered a racial or ethnic epithet in his presence, and no other witness, even those called on Complainant's behalf, testified that anything racial or ethnic occurred in relation to any of these incidents.

For example, in one police report Complainant filed against Schick, concerning the October 14, 1988 incident for which he had Schick arrested, he told the responding police officer that this incident occurred because Schick was a plumber and he was a machinist and Schick did not want him in his work area (see testimony of Cendejas).

A witness to a portion of the October 14, 1988 incident, Richard Arnold, testified that he heard Schick tell the Complainant to get out of here, this is our office, you do not belong in here, you do not belong with us; that Schick was yelling and was out of control; and that he did not hear Complainant provoke Schick. But at no time does

Arnold make any reference to a racial or ethnic predicate for this altercation (see testimony of Arnold).

The absence of any racial or ethnic predicate for the incidents involving Schick and Parisi is also borne out with respect to the two incidents complainant emphasized at the hearing, those that occurred on July 28 and July 30, 1992.

In the July 28 incident, Complainant claims that Schick approached him near the tool room and threatened him by yelling that he was going to "kick his ass, that his ass was dead and that he was history." Schick denies making these specific comments but acknowledges that he might have told Complainant that he hated him. Schick also acknowledges that he did yell at the Complainant on this occasion and that he did physically approach the Complainant two or three times, as the Complainant maintains (testimony of Schick). However, Schick also testified that this confrontation occurred because the Complainant had called him "a fucking dickhead" earlier, an accusation which the Complainant denies (testimony of Schick).

An employee who interceded on behalf of the Complainant that day, Gamble, was working in the toolroom when Complainant called out Gamble's name as Schick was walking through the area, just prior to the time this confrontation took place (testimony of Gamble and Cendejas). Gamble, who was also Complainant's union representative at the time, testified that he did not hear Complainant say "dick," but he heard Schick accuse the Complainant of saying that. He also testified that Schick repeatedly asked Complainant why he had called him a

"dick," while pointing his finger at the Complainant in an aggressive manner (testimony of Gamble).

Pat Day was present on this occasion, as well. Day, who had served as one of Complainant's supervisors, was not a supervisor at this time. According to Day, he did not hear Complainant swear, nor did he hear Schick say "your ass is grass". Day also did not recall Gamble interceding in the altercation and he could not say that another employee, De Luna, was present, as the Complainant claims.[5] Day does indicate in his testimony, however, that he recalled two or three other shouting matches between Complainant and Schick (testimony of Day).

Bruner testified that when he looked into this incident Complainant's supervisor, Johns, who was also present, told him that Schick had accused the Complainant of calling him a "dick." Bruner also testified that he did not recall seeing any written statements from Gamble or De Luna concerning this incident, and that when he did interview Gamble about this matter Gamble told him very little and did not present the statement he said he would provide (testimony of Bruner).

Bruner decided to discipline the Complainant for this altercation rather than Schick because he determined, based on his interviews with Gamble, De Luna, Day and Johns that Complainant had provoked the situation. He came to this decision, based not only on the probability

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[5] Complainant maintains that De Luna was a witness to this altercation but Bruner failed to question either De Luna or Gamble about the incident when he investigated the matter, thereby performing a poor investigation and intentionally suppressing evidence.

that Complainant had first called Schick a "dick", but on several past incidents around the shop involving the Complainant that he was aware of, and because, he says, Complainant knew that Schick could be easily fired up. Bruner admits that none of the witnesses he talked to said that they had heard Complainant call Schick a "dick" immediately before the altercation (testimony of Bruner).

Bruner also indicates that none of Complainant's witnesses to this incident provided written statements until approximately two months after the event, and that they gave him very little information when he talked to them (testimony of Bruner).

Bruner's supervisor at this time was Commander Wegener, the Public Works Officer. Wegener testified that he did not receive a statement from De Luna until well after the event and, therefore, he gave it very little credit when he reviewed the matter. This conforms to Bruner's testimony as to the late receipt of witness statements from Complainant's witnesses.

Wegener also indicates that when he did see a statement from Gamble he doubted Gamble's credibility because it appeared to him that the Complainant and Gamble were working the thing together, or had staged the confrontation in front of the tool room. It is significant in this respect that both the Complainant and Gamble admitted in their testimony that the Complainant had called out Gamble's name just as Schick was approaching the tool room where Gamble was working on July 28. No claim or any evidence exists to indicate that Schick had

instigated anything with the Complainant that day prior to this incident.[6]

Wegener also indicates that he reviewed Johns' statement in which Johns indicated that Schick had informed him that Complainant had called him a "dick" that day.

Notwithstanding the conflicts in the testimony of the witnesses to the July 28 incident, or whether it could be definitively said that the Complainant was the instigator, it is perfectly clear that no witness indicates, or even intimates, that a racial or ethnic basis formed the predicate for what happened.

The same thing can be said for the July 30, 1992 incident between Parisi and the Complainant, in which Parisi admits that he kicked the Complainant in the chest. That is, there is simply no evidence, or even a claim, that what occurred was motivated by any racial or ethnic animus harbored by Parisi against the complainant.

What is clear, as was the case above, is that the incident posed a legitimate question as to whether Parisi was provoked by the Complainant, and that the agency had a reasonable basis to conclude that the Complainant may not have been an entirely innocent victim, as he claims, even though it recognized that Parisi had clearly

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[6] It is also interesting to note that Complainant mentions a problem he had with Parisi on July 28 concerning tools being locked up (another one of Complainant's several allegations), but mentions no prior problem with Schick that would adequately explain his need to call out Gamble's name before Schick had done or said, anything to him (see testimony of Cendejas and Gamble).

acted in an aggressive manner, which in another forum, might subject Parisi to civil liability.[7]

Parisi, like Schick, claimed that Complainant provoked him on July 30, 1992. For example, Parisi told Bruner that Complainant pushed him first, and that he reacted spontaneously by spinning around and kicking the Complainant (testimony of Bruner, CR).

There were no percipient witnesses to this event, like their were for the July 28 incident, but two people were in a position to hear bits and pieces of the conversation that transpired between Complainant and Parisi on this occasion. One such person was an individual Complainant was talking to on the telephone when Parisi approached him that day. According to this person, Ms. Variela, she heard Parisi yelling and the Complainant telling him to be quiet while she was trying to talk to the Complainant on the phone.

Pietrick, an employee who was passing by the office where this incident occurred, told Bruner that he heard Parisi tell Complainant that if you (the Complainant) ever touch me again I will deck you, you SOB (see testimony of Pietrick and Bruner). Pietrick admits that he did not see Complainant push Parisi, and although he heard the two arguing as he was passing by, he had no idea what the argument was about (testimony of Pietrick).

Complainant testified that Parisi began to yell at him to spell his name right to the person he was talking to on

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[7] Ultimately, Commander Wegener disciplined both the Complainant and Parisi for this incident.

the phone. He also testified that when Parisi began to yell he lifted his hand up with the telephone receiver in it in a gesture of asking Parisi to be quiet, and that Parisi kicked him immediately thereafter (testimony of Cendejas).

In a police report Complainant filed on this incident, he mentions that he and Parisi had words that morning prior to the kicking incident, concerning the use of tools, and that Parisi had walked in on him while he was on the phone. No mention is made in the police report of any racial or ethnic basis for this incident (see AE:4).

As to the Agency's inquiry into this incident, which the Complainant also attacks as being insufficient, Bruner testified that he credited Parisi's claim that Complainant had pushed him first, because Pietrick said he heard Parisi tell Complainant not to push him again. Bruner also indicates that he did not rely on Ms. Variela's statement about what she heard because she did not see anything and because he did not actually see her statement until sometime in 1993.

The Complainant admits that Johns questioned him about this incident and that the report Johns filed on his inquiry (AE:2) was a fairly accurate rendition of what occurred (testimony of Cendejas).

Commander Wegener testified that after this incident the Complainant was not available for comment; that the agency had very little contact with him; and that they could not get a statement from him even though he had been seen in various areas on base (testimony of Wegener). No contrary evidence was presented.

The scenario is the same with all of the incidents of verbal and physical conduct for which the Complainant

blames Parisi and Schick. That is, Complainant claims that one thing occurred while the alleged harassers indicate that something else occurred; or they claim that Complainant provoked them in some way, with little or no corroborating evidence being available.

Bruner testified that these situations involving Complainant, Schick and Parisi, always left doubt as to what provoked the conduct complained of, and that no one was able to verify what occurred. In effect, this is the classic situation of one person's word against the other's (testimony of Bruner).

Wegener also testified that there were rarely any credible witnesses who could immediately be found to give a clear, convincing view of what transpired between these three employees; that most of the written statements that were ultimately produced by Complainant's witnesses were received well after the fact; that all of the information he received about these incidents when they occurred tended to implicate the Complainant as the problem, and that no other employee reported having had similar problems with Schick and/or Parisi. In other words, Wegener reasonably concluded there would have been no problem if Complainant was taken out of the mix (testimony of Wegener).

Wegener also testified that he saw absolutely no evidence of racial animosity being involved in any of these incidents, and that he viewed the situations as being generated by a lack of maturity and the ability to get along at work. In effect, basic child's play (testimony of Wegener).

A review of the evidence of record concerning the general atmosphere in WC-40, tends to substantiate

Wegener's assessment as to the nature of the relationship between Complainant, Schick and Parisi. For example, one of Complainant's witnesses who worked in WC-40, Richard Arnold, testified that there were a lot of hassles between the Complainant and Schick but, based on his observations, he believed that they just did not get along, or just did not like each other. Arnold also indicates that Schick was a real hot head who did not take any "crap" from anyone; that he was hard to reason with at times; that he also regularly had loud arguments with supervisor Johns between 1990 and 1992; and that Schick tended to yell at people he knew (testimony of Arnold).

Arthur Rankin, the EEO counselor for Complainant's cases testified that in his experience, Schick is generally loud but he had never heard him make any racial comments.[8] Rankin also testified that he did not perceive any animosity or hostility on Bruner's part towards the Complainant when he contacted him during counseling (testimony of Rankin).

Pat Day testified that Schick was belligerent but not hostile. He also related an incident he observed in which Schick showed the Complainant a note that had been left on his truck and asked the Complainant if that was his idea of a joke. Day also opined that although he felt that Bruner had some dislike for the Complainant and might be willing to accept other people's versions of events, he

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[8] With the exception of Johns' use of the word "si", which will be discussed infra, the complainant never claimed that either Schick or Parisi had ever uttered a racial or ethnic epithet; and absolutely no other evidence of record exists to suggest that Schick, Parisi, or any one else involved with the complainant in these cases did so either.

did not believe Bruner would ignore independent witness statements (testimony of Day).

Schick himself, as already noted, readily admitted that he did not like the Complainant; that the Complainant had him arrested and taken off the base in hand cuffs; and that he and the Complainant both had been instructed on more than one occasion by management officials, including Bruner, to stay out of each others way (testimony of Schick).

Schick also responded to Complainant's reference to the May 12, 1989 incident in which he told the Complainant to stay out of the (enlisted men's) club. Although he denies that he tapped Complainant on the shoulder on that occasion, as Complainant claims, he does admit that he told Complainant to stay out of the club. He explained, however, that he said this to the Complainant because the Complainant had taken his (Schick's) tool bag to the club (testimony of Schick). The complainant never contradicted this claim, and no claim or any evidence was presented to suggest that this incident occurred for any reason related to Complainant's race or ethnic origin.

Schick also indicates in his testimony that Bruner verbally cautioned him about this incident (testimony of Schick).

With respect to an incident that occurred on February 8, 1991, in which Complainant claims that Schick intentionally elbowed him at the copy machine and told him to "to stay the fuck out of my way", Schick denies using the profanity attributed to him, and claims that the Complainant was standing in front of the door and would not move to let him pass. According to Schick, when the Complainant would not let him pass he just opened the

door and the door pushed complainant out of the way (testimony of Schick and Cendejas).[9]

According to several witness statements provided to the EEO counselor, the Complainant was not entirely an innocent party in his interactions with Schick, Parisi and other co-workers.

For example, Rosplach, the chief union steward, informed the counselor that the Complainant agitated people; that he liked to boss people around; and that he threatened people. According to Rosploch, this had been going on ever since 1985, and that management was concerned that the Complainant might become violent at work like some postal employees. Rosploch acknowledged that although Complainant intimidated others, he had not seen Complainant assault anyone.

Rosploch further indicated to the counselor that nobody liked the Complainant, including himself, and that he refused to work with the Complainant. He also indicated that the Complainant pointed his finger at people like he had a gun and that he wore camouflage attire to work.

Another employee, Boyer, told the counselor that the Complainant always antagonized people and provoked

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[9] The Complainant informed Bruner that a David George was a witness to this incident. According to Bruner, when he questioned George about it, George said he had not seen anything. As Bruner and Wegener indicated, this seemed to be the pattern with incidents in which Complainant claimed he had been assaulted or harassed by Schick and/or Parisi. Witnesses did not or would not corroborate the Complainant's version of events, or no witnesses existed.

situations by making derogatory statements and laughing at people. Boyer also corroborates Rosploch that the Complainant used a lot of finger gestures (see CR).[10]

Parisi indicates in the counselor's report that Complainant caused a lot of stress in the workplace; that he tried to boss him around and that he threw a tennis ball and a pine cone at his truck.

An employee in the Employee Relations Department, Karen Koroknay, indicates in the Report of Investigation that the agency was having a continuous problem with unprofessional conduct among certain employees and that the Complainant seemed to be the common thread. Koroknay first became aware of the situation involving the Complainant when she received the March 29, 1989 letter from Chief Steward Rosploch on behalf of Parisi, in which Parisi threatened to hold the agency responsible for any civil action brought because of the Complainant's conduct (see CE-2:7).

Koroknay also indicated that when warnings and counseling did not curtail the problem, the Complainant was issued a Letter of Caution, mitigated from a suspension, and that other employees were disciplined as well.

The Complainant admits in his testimony that he threw a pine cone and a tennis ball at Parisi's truck in August, 1990, and that he was given a letter of caution for

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[10] It is interesting to note that Schick claims that the Complainant frequently flipped him off with his middle finger, but there were never any witnesses around to see him do this. Schick also claimed that the complainant would point his finger at him as if it were a firearm and that he used profanity at him as well.

this. He also admits that he had been guilty of engaging in horseplay and practical joking at work, and that he went to employee counseling because of this (testimony of Cendejas).

Complainant also testified that he had a December 1990 meeting with management in which he expressed a desire to stop the horseplay and to be more professional. Complainant also suggested in his testimony that he believed Schick's animosity towards him was based on the fact that Schick had been promised his job (testimony of Cendejas).

Finally, the Complainant admits that a lot of employees had bad feelings about him because he had Schick arrested; and after first testifying that it was not his style to use profanity, or make profane gestures, that he had in fact used profanity towards Parisi on at least one occasion (testimony of Cendejas).

Record evidence reveals that the ALJ who heard Complainant's workers compensation case concerning the assaults he complains of herein, found insufficient evidence that those incidents occurred as Complainant related them (see AE:7); that Complainant's physician reported that Complainant had a fairly rigid, compulsive and slightly paranoid personality; and that the Complainant admits he wore camouflage clothes to work and brought a bow and arrow to work (see testimony of Cendejas).

The record contains five written complaints from Schick to Johns dating back to January, 1990, in which he complains about the Complainant harassing him by trying to run him down with his truck, repeatedly flipping him off, calling him a "fucking snitch, spitting on him, putting

his thumb on his nose and wiggling his fingers at him and motioning with his hand as if he had a gun in his hand (see AE:8 and testimony of Schick). Schick also testified that his problems with the Complainant all started a long time ago when he attempted to throw an orange peel into a waste basket near Complainant's work area and missed (testimony of Schick). Complainant provided no contrary evidence.

The record also indicates that two other employees, namely Johnson and Boyer, also filed written complaints about Complainant harassing them (HT:322-324). As was typical, Complainant claims their versions of events were not accurate (see CE-2:11).

As to discipline, the record reflects that Wegener disciplined both Parisi and the Complainant for the July 30, 1992 incident; that Bruner has disciplined other employees and supervisors for engaging in inappropriate physical conduct involving the one other Hispanic employee Complainant claims was similarly harassed (vigil); and that Bruner made at least two efforts to hold a meeting with him and Schick in an effort to work things out, but Complainant refused to attend after two orders to do so (testimony of Bruner, Cendejas, Schick and Gamble; AE:1).[11]

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[11] Although the evidence reveals that Schick also refused to attend the first meeting Bruner had set up to discuss his problems with the Complainant, Schick did agree to attend the second meeting on Bruner's request, unlike the Complainant (testimony of Bruner, Schick and Cendejas).

The closest Complainant comes to interjecting his ethnicity into any of these incidents, is his reference to the undisputed fact that his first level supervisor during a portion of the period of reference in this case, Al Johns, used the Spanish word "si" in his presence in a derogatory manner, which he described as a "Frito Bandito" accent (see Complainant's closing brief).

The evidence reveals, however, that Johns used this word with many individuals, notwithstanding their ethnic origin; that he was using this word prior to Complainant's employment; and that when he was made aware of the fact that Complainant was offended by his use of this word he stopped using it (see testimony of Bruner and Arnold). Complainant acknowledges, that with the exception of two slips, after he had informed Johns that he found his use of "si" to be offensive, Johns ceased using it (testimony of Cendejas).

On the basis of the foregoing, I find that the Complainant has failed to establish a prima facie case of hostile environment discrimination, because he made no showing that what occurred between him and Parisi and Schick was predicated upon his national origin; that he was reasonably viewed as being the instigator in many of the incidents to which he cites in his complaints; that he was the subject of complaints of harassment by Parisi, Schick and others; that he too engaged in inappropriate behavior at work; and that the agency did react reasonably to his allegations of harassment, even though no evidence of a racial or ethnic predicate was shown to exist.

Although the Complainant filed EEO complaints against Bruner, one dating back to 1985, I cannot find that Bruner failed to properly investigate his allegations of

harassment, or that he suppressed any evidence, because of his EEO complaints.

What the record shows is that Bruner was always confronted with conflicting stories, as well as witnesses who could either provide no corroborating evidence, or who did not submit statements until well after the events in question.

In the absence of any evidence that Bruner has or would have reacted differently under similar circumstances, had the Complainant not filed EEO complaints (or had he not been Hispanic), and no such evidence was presented, I cannot conclude that Bruner failed to adequately investigate Complainant's claims of harassment, or that he failed to take appropriate steps to rectify the situation presented, for any reason related to Complainant's EEO activities or to his national origin.

## THE PERFORMANCE APPRAISAL ISSUES

Complainant alleges that Bruner changed one of the ratings which supervisor Day had given him on his 1988-1989 appraisal from Outstanding to Highly Satisfactory without his signature, because of the EEO complaint he filed against Bruner in 1985.

He also alleges that supervisor Johns deleted comments he had made on his 1992 appraisal in which he requested feedback from management, and that Johns gave him a Minimally Successful performance appraisal in 1992, without his signature or review, in order to poison his new job at the Public Works Center, San Francisco because Johns is a racist by virtue of the fact that he used the word "si" in his presence.

As to the 1988-1989 appraisal issue, there is no dispute that the Complainant had filed a prior EEO complaint against Bruner and that Bruner was aware of it when he made the change complainant complains of. However, that complaint was filed in 1985, some four years before Bruner changed the evaluation. Accordingly, I find that the Complainant has failed to establish a prima facie case of reprisal because the time interval between the alleged adverse action and the protected activity is too great to infer a retaliatory animus, and because no other evidence of a retaliatory intent has been presented on this record. In fact, there is evidence of record to the contrary from EEO counselor Rankin, who testified that Bruner was not hostile or irritated when he questioned him about Complainant's complaints (testimony of Rankin).

Moreover, even assuming for arguments sake that the Complainant had established a prima facie case of reprisal, the evidence of record reveals a non-retaliatory reason for the change made to Complainant's evaluation after he had signed it, namely, supervisor Day's belief that Bruner had just made a comment on the appraisal and had not actually changed a rating, and Day's mistaken assumption that Bruner had asked him (Day) to initial the change rather than taking what he believed was just the addition of a comment to the appraisal, to the complainant to initial, as Bruner testified he requested Day to do (testimony of Day and Bruner).

Day also testified that this was the first time that one of his ratings had been changed by a higher level reviewer and he did not determine what he thought had been just the addition of a comment was actually a change to one of the rating factors, until sometime later. Complainant provided no contrary evidence.

Accordingly I find, that even if the Complainant had made out a prima facie case of reprisal, the agency has demonstrated a non-retaliatory explanation for the lack of his signature or initials on the changed rating, namely, confusion on Day's part that he was to secure complainant's initials after the change had been made, and Day's mistaken belief that Bruner had only made a comment on the appraisal rather than actually having made a change to one element.[12]

With respect to Complainant's claim that Johns deleted the comments which he made on his 1992 appraisal and placed his final 1992 appraisal into his personnel record without his signature because he is a racist by virtue of the fact that he used the word "si", no evidence was presented to connect Johns' use of the word "si" directly to his actions with respect to Complainant's 1992 appraisal. See *Randle* v. *LaSalle Telecommunications, Inc.* 876 F.2d 563, 569 (7th Cir. 1989) (direct evidence of discrimination must speak not only to intent, but also to the specific employment decision in question). Moreover, I cannot derive a racial predicate for these matters simply because Johns used the word "si", since undisputed evidence reveals that Johns used this word in reference to non-Hispanics; that he used it before Complainant was

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[12] Although Bruner changed one rating element from Outstanding to Highly Successful, Complainant's overall rating remained Outstanding. It seems rather unlikely that had Bruner really intended to retaliate against the Complainant by changing his appraisal rating that he would have only made a minor change that would not affect the overall rating, and that he would have waited four years to make a change to Complainant's evaluation.

hired; and that he ceased to use it after learning that Complainant was offended by it.

The evidence of record also reveals non-discriminatory reasons exist for these two actions. For example, as to the elimination of Complainant's comment for more feedback on his 1992 evaluation, the record demonstrates that the Complainant had entered the comment in the block for supervisor comments and that Johns entered the same comment on the evaluation at the mid-way point of the rating period (see CE-2:16). On the basis of this evidence, it simply makes no sense that Johns had any ill motive in mind when he removed Complainant's comment, since he had written the same thing on the evaluation, albeit on a prior occasion.

As to placing Complainant's 1992 "Minimally Satisfactory" evaluation into his personnel file without his signature, the evidence reveals that the Complainant was not present at work to sign or receive this evaluation, and that when he did return to work the evaluation had already been forwarded to his new employer, Navy Public Works (testimony of Cendejas). Complainant presented no evidence that he would have been treated any differently had he not been Hispanic, or had he not filed an EEO complaint.

As to Complainant's assertion that Johns wanted to poison him with his new employer, he admits that he received an Outstanding evaluation after his first year of employment with Navy Public Works.

Accordingly, I find that the Complainant has not demonstrated that Johns' actions as to his 1992 appraisal occurred because he harbored racial animosity against

him, notwithstanding the fact that he used the word "si", in the manner alleged by the Complainant.

## THE FAILURE TO DISCIPLINE SCHICK AND PARISI FOR WORKING ON PERSONAL BUSINESS AT WORK

The Complainant testified that he had informed Johns that Schick and/or Parisi were engaged in personal business at work, but management did not discipline them for this. Bruner testified, without any contradiction, that although this may have been true, the Complainant was also allowed to work on one of his hobbies at work (working on his paint ball gun) and was not disciplined. Accordingly, I find no basis to conclude that the Complainant was discriminated against because Schick and/or Parisi were knowingly allowed to perform personal tasks at work.

## WITHHOLDING A LETTER OF APPRECIATION

Complainant alleges that Bruner intentionally failed to place a Letter of Appreciation he received from the Marine Corps into his personnel file. The evidence reflects that Bruner received this letter after the Complainant had been transferred to Navy Public Works in January, 1993; that he simply forwarded the letter to Complainant's new supervisor at Public Works; and that he had no further involvement with the matter (testimony of Bruner).

The Complainant presented absolutely no evidence that would serve to contradict Bruner's testimony, or which would demonstrate that Bruner would have done anything differently, under similar circumstances, had the Letter of Appreciation been submitted on behalf of a non-Hispanic, or an employee who had not filed a prior EEO

complaint. In effect, beyond his naked assertion and his claim that something was amiss because other Letters of Appreciation he had received were in his file, I cannot find, based on the foregoing, that Bruner was responsible for the fact that Complainant's Letter of Appreciation from the Marine Corps did not find its way into his official personnel file after he had been transferred to Navy Pubic Works.

## THE PLACEMENT OF DISCIPLINARY ACTION INTO THE PERSONNEL FILE WHILE THEY WERE BEING GRIEVED

The Complainant maintains that disciplinary actions he received were inappropriately placed or kept in his personnel file while he was grieving those actions. Presumably, this occurred because of his national origin and his EEO activities.

Commander Wegener testified that disciplinary actions are not removed just because an employee files a grievance over them (testimony of Wegener). Bruner testified that it was normal procedure for disciplinary actions to remain in a personnel file even when grievances are filed over them, and that they would only be removed based upon some final disposition on the grievance, or by direction of a court (testimony of Bruner). No contrary evidence was presented. More significantly, no claim or any evidence was presented to demonstrate that disciplinary actions have been removed from the personnel files of non-Hispanic employees, or employees who have not filed

EEO complaints, just because they filed a grievance over the action.[13]

Accordingly, I cannot conclude that the Complainant was treated any differently with regard to disciplinary actions that were grieved, than any other employee, regardless of their race or past EEO history.

## THE TOOL BOX ISSUE

In his complaint, the Complainant alleges that he was not allowed to have a tool chest in the machine shop in 1993. The evidence presented at the hearing concerning this issue related primarily to the fact that Parisi had locked up some tool holders that the Complainant needed to use in his own tool drawer, and that Complainant complained to Johns about it (testimony of Cendejas).

The evidence reflects that this did in fact occur. But, as with all of the Complainant's allegations, absolutely no basis exists to find that Parisi's actions in this respect were predicated on his race or national origin.

As to Johns role in this incident, the evidence reflects that Johns instructed Parisi not to lock the tool holders in his personal drawer; that Parisi locked them up again on a subsequent occasion; and that on a third occasion, Parisi put them in a common tool box (testimony of Cendejas).

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[13] The disciplinary actions complainant mentions in his testimony are not ripe for disposition in this forum because complainant elected to seek relief therefrom pursuant to the grievance process (see complainant's pre-trial statement of issues).

Notwithstanding that Parisi failed to comply with Johns' instruction not to lock the tools into his own drawer on one occasion, I cannot find that Parisi was motivated to act in the first instance, or that he failed to comply with Johns' instruction in the second instance, for any reason related to Complainant's national origin.

As to John's reaction, there was again no evidence that he would have done anything differently, had someone other than the Complainant complained about Parisi locking up tools, considering the relationship that existed between them.

Accordingly, I cannot conclude that Complainant was discriminated against because of his national origin, with respect to his tools, as he alleges.

## BURNERS [sic] STATEMENTS ABOUT COMPLAINANT'S MENTAL STABILITY MADE TO A SECURITY POLICE OFFICER AND TO AN EEO INVESTIGATOR

Complainant alleges that general foreman Bruner commented about his mental stability to a security officer and an EEO investigator, in reprisal for filing EEO complaints against him.

Although there is no dispute that Complainant filed EEO complaints against Bruner, no basis exists to conclude that his comments concerning Complainant's mental stability were predicated upon any retaliatory animus. What the evidence does reflect is that Bruner was concerned about Complainant's mental stability based on rumors that Complainant had attempted to commit suicide when he worked at Mare Island prior to coming to

Concord, the fact that employees had expressed fears about the Complainant bringing a bow and arrow to work, and because the Chief union steward had reported that a knife was in Complainant's locker (testimony of Bruner).

On the basis of the foregoing, I cannot find that Bruner's concerns about Complainant's mental state was related in any way to the fact that he had filed EEO complaints against him, but rather were a layman's diagnosis based upon a series of events and rumors related to Complainant's conduct.

## V. CONCLUSION

Having considered all of the evidence of record, I hereby recommend findings of no discrimination and reprisal on all of the Complainant's allegations.

## NOTICE

If the agency does not issue a decision rejecting or modifying my findings and conclusions within 60 calendar days after the agency receives the complete complaint file and findings and conclusions from me, my findings and conclusions will become the final agency decision. 29 C.F.R. 1614.108(g).

An agency decision rejecting or modifying my findings and conclusions must contain the rationale for the rejection or modification.

The final agency decision must be sent to the complainant.

The agency must also notify the complainant in writing of his right to appeal the agency's final decision to

the Equal Employment Opportunity Commission and to file a civil action within 90 days after receipt of the agency's final decision if no appeal is filed, or within 90 days after receipt of the Commission's final action on the appeal (29 C.F.R. 1614.408).

10-17-94
(DATE)

/s/ Thomas Cosentino
Thomas Cosentino
Administrative Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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|---|---|
| MANUEL R. CENDEJAS, JR.,<br>Plaintiff-Appellant,<br>v.<br>HANSFORD T. JOHNSON,<br>Acting Secretary of the Navy,<br>Defendant-Appellee | No. 02-16875<br>DC # CV-00-02188-SBA<br>Northern California<br>(Oakland)<br>ORDER<br>(Filed Nov. 20, 2003) |

Before: BROWNING, LEAVY, and HAWKINS, Circuit Judges

The panel has voted to deny Appellant's petition for panel rehearing.

Judge Hawkins has voted to deny Appellant's petition for rehearing en banc, and Judges Browning and Leavy so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

To: Whom it may concern

From: Manuel R. Cendejas Jr., complainant of four equal employment opportunity (EEO) complaints of discrimination and reprisal against the U.S. Navy (agency), Concord Naval Weapons Station

Re: Complainant's rebuttal response to the 17 Oct 1994 findings and conclusion of EEOC Administrative Judge, Thomas Cosentino, in the matter of the 19&20 July 1994 EEOC administrative hearing at Concord Naval Weapons Station (CNWS) to hear the following EEO complaints by Manuel R. Cendejas Jr. (Complainant): EEOC # 370-94-X2450, X2451, X2452 & X2453 AGENCY # DON-92-60036-010 (consolidated first three complaints) & DON-93-60036-015

EXHIBITS (2-14 are omitted within Plaintiff's Writ Of Certiorari)

Exhibit 1 – Complainant's response to the 17 Oct 1994 findings and conclusion of EEOC Administrative Judge, Thomas Cosentino, in the matter of the 19&20 July 1994 EEOC administrative hearing at Concord Naval Weapons Station (CNWS) to hear the equal employment opportunity complaints by Manuel R. Cendejas Jr. (Complainant)

Exhibit 2 – 2Nov1992 response by Complainant regarding Navy notice of acceptance of discrimination complaint

Exhibit 3 – 26Oct1992 findings by EEO Counselor Paul Rankin with Navy response concerning Complainant's third EEO complaint alleging agency reprisal by intentional delay of first complaint

Exhibit 4 – 29Mar1989 letter written by Chief Union Steward Rosploch representing Parisi and addressed to IDO-Bruner

Exhibit 5 – 16Jan1991 decision on proposed suspension; letter of caution

Exhibit 6 – 16July1992 Parisi verbal incident; 29Oct1992 letter by Complainant-Cendejas to answer OWCP about Complainant's relationship with Parisi

Exhibit 7 – 8Oct1993 EEO desire list of workforce composition

Exhibit 8 – examples of reprisal and disparate treatment after filing first formal EEO claim in early 1992. Enclosures within Exhibit 8 are the following:

19Feb199214 thru March1992 Complainant's journal of EXAMPLES OF HARASSMENT AND DISPARATE TREATMENT in reverse chronology (2 pgs.)

14May1992 Gamble statement about due process

5Aug1992 PO Nielson statement about IDO-Bruner's slanderous statement on 30July1992

14Aug1992 CNWS access restriction

19Aug1992 Long statement (2 pgs.)

24Aug1992 Complainant-Cendejas statement (5 pgs.)

9Sept1992 OWCP instructs Navy to continue Complainant's pay

16Sept1992 2nd OWCP instruction to continue Complainant's pay

29Sept1992 ltr. to Civilian Personnel Mgt. Director, Roberta K. Peters about Navy withholding Complainant's injury compensation pay

4Feb1993 ltr. to PWC-SFB Capt. Wynn about disparate treatment (4 pgs.)

10Feb1993 Complainant-Cendejas statement about Johns harassment

10April1993 Complainant-Cendejas statement about Johns harassment

12April1993 incident statement by Victor Light about Johns harassment

22April1993 labor violation charge about tool issue

17May1993 Coppinger memo about tool issue

22June1993 Complainant-Cendejas statement about Johns harassment

29Oct1993 incident Complainant-Cendejas statement about Johns harassment

29Oct1993 Terry Wright statement about Johns harassment

30Sept1993 rebuttal to Johns' EEO affidavit (2pgs.)

30Sept1993 rebuttal to Bruner's EEO affidavit (3pgs.)

Exhibit 9 – 23Sept1992 thru 7Jan1993 California Community Dispute Services correspondence

Exhibit 10 – 28July1992 Schick incident statements by Complainant-Cendejas, Gamble, De Luna, Day, Johns and Schick

Exhibit 11 – 30July1992 Parisi incident -- includes statements by Complainant-Cendejas, Johns, Pietrick, Varela, and Parisi. Also includes the following related documents:

30July1992 Concord Police Pettus report

12Aug1992 Concord Police Crain follow-up report

26Oct1992 Kawakami EEO report (page 11 only) Johns and Bruner interviews

30July1992 CNWS dispensary permits

5Aug1992 DOL-OWCP employee's notice of traumatic injury & claim for continuation of pay

5Aug1992 DOL-OWCP official supervisor's report

3Aug1992 Dr. Sher's physical status report

3Aug1992 Dr. Sher's report of occupational injury

3Aug1992 Dr. Sher's attending physician's report

12Aug1992 Complainant-Cendejas' letter to Dr. Sher

18Aug1992 John Muir Chiropractic worker's compensation form

14Aug1992 Navy notice to OWCP controverting Complainant's injury claim (2 pgs.)

17Aug1992 Navy notice of Complainant to controvert injury claim

16Sept1992 Complainant-Cendejas correspondence to OWCP (2 pgs.)

Exhibit 12 – 21July1992 Schick incident and obscene note

Exhibit 13 – 12May1989 Schick incident statements by Complainant-Cendejas, and witnesses to incident, Rawson, and VanDiver

Exhibit 14 – Oct1992 Equal Employment Opportunity Management Directive 110 (EEO MD-110)

COMPLAINANT'S REBUTTAL RESPONSES to 17 Oct 1994 Findings and Conclusions of EEOC Administrative Hearing held on 19 & 20 July 1994.

Page 1, 3rd paragraph (of 17 October 1994 Findings and Conclusion)

IN RESPONSE TO: "In complaint No. 370-94-X2454, the agency accepted the following issues for processing . . ."

COMPLAINANT'S RESPONSE: One of the Complainant's issues is that the agency (Navy) whitewashes, downgrades, rewords and omits original issues of complaints so that they won't be considered or can be better defended (see CD-Rom, Exhibit 2). The issues "accepted by the agency" are not all-inclusive and the Navy's refusal to acknowledge all of Complainant's issues including the rescinded disciplinary actions is an example of suppressing due process of the original issues presented to the Navy by the Complainant.

Please note the name of the addressee in Exhibit 2. Deborah K. Eres was not only the Deputy Equal Employment Opportunity Officer, but Ms. Eres was also site manager of the Concord Naval Weapons Station (CNWS) Human Resources Office (personnel manager). This situation (being both the deputy EEO officer and the HRO personnel manager) is in direct violation of 29 CFR § 1614.605(c). This situation is also in direct violation of Equal Employment Opportunity Management Directive 110 (EEO MD-110), which sets guidelines of independent authority and addresses such conflicts of interest. EEO MD-110 specifically states that "EEO officials cannot serve as representatives" (see CD-Rom, Exhibit 14 at IV.). Complainant sees this situation as the major reason that the Navy did not serve the Complainant appropriately (with fair and equitable treatment) at this

stage of his complaint (further explained below IN RESPONSE TO: Page 3, 4th paragraph). Complainant also sees this situation as the very reason for the need to implement and adhere to EEO MD-110.

Page 2, 1st paragraph

IN RESPONSE TO: "Prior to the commencement of the hearing, complainant voluntarily withdrew several of the above accepted issues."

COMPLAINANT'S RESPONSE: complainant vehemently denies "voluntarily" withdrawing any of the issues that would weaken or defeat complainant's disparate/circumstantial discrimination and reprisal (for participating in) EEO complaints. Any suggestion of withdrawing any issues were ultimately made by the EEOC Administrative Judge (EEOC AJ), Thomas Cosentino, who the plaintiff sees as bias and capricicus in the handling of this EEOC case and in the handling of other discrimination cases by employees (John Vigil & Fred Gamble) at Concord Naval Weapons Station (CNWS).

Page 3, 4th paragraph

IN RESPONSE TO: "Complainant filed formal complaints on these matters on June 26" . . .

COMPLAINANT'S RESPONSE: Although the first complaint was filed formal [sic] on 26 June 1992, the Navy withheld the complaint until 28 October 1992, twenty-eight days past the deadline as per federal regulations 29 CFR 1614 and against due process (see CD-Rom, Exhibit 3, at F. *Information Tending to Support the Allegations*). This issue is important to Complainant because it represents a time of intense reprisal, harassment and discrimination that is in concert with a causal time factor suggesting reprisal for filing EEO Complaints. The Complainant's hostile

federal workplace conditions were so severe as to cause the Complainant to suffer a psychological (emotional) condition, which is corroborated at that time with two Dept. of Labor, Office of Workers' Compensation Program (OWCP) claims. The Navy did not inform the Complainant or the Complainant's representative that the complaint was being withheld despite several inquiries into the status of the complaint. Interim agreements on some of the issues (fair and equitable treatment, harassment, access to shop's tooling) were not adhered to, and in fact were leading factors of subsequent workplace assaults upon the Complainant. Said factors are also partial-focus of five subsequent OWCP claims (all OWCP claims have been accepted). The Navy could offer no viable excuse for withholding the formal complaint. There were no serious attempts by Navy administrators to negotiate Complainant's issues or to support the interim agreements. Withholding Complainant's first formal complaint is the main issue of Complainant's third EEO complaint that was deliberately omitted for consideration. Complainant cites this as another example of Navy / EEOC whitewashing and omitting issues of complaints so that they won't be considered or can be better defended.

Page 3, footnote

IN RESPONSE TO: "Michael Parisi was also called as a witness for the Complainant and he was made available to appear. The Complainant, however, chose not to call him as a witness."

COMPLAINANT'S RESPONSE: It has been falsely conveyed that witnesses were not called by the Complainant's choice. Time restraints imposed by the EEOC AJ and delays by management because of uncooperative witness Schick more accurately describe the reasons that available witnesses were not called.

Schick refused to participate in the hearing and did not show until the EEOC AJ threatened to have him fired. When Schick did show, he had to be escorted by two Navy security personnel throughout his testimony.

Page 8, 1st paragraph

IN RESPONSE TO: "Two such employees were Michael Schick, a plumber, and Michael Parisi, another mechanic, both of whom Complainant alleges subjected him to verbal and physical assaults, threats and harassment which created a hostile work environment because of his national origin with management ignored."

COMPLAINANT'S RESPONSE: Complainant's EEO complaints clearly identify Navy managers, NOT his coworker assailants, as responsible for allowing known workplace hostilities against minority workers (two Hispanic employees, Complainant-Cendejas, and Vigil). The true form of shop conflicts primarily focus on Schick, who subjected Complainant to numerous verbal and physical assaults, threats and harassment over many years, and which Navy managers were aware of, yet failed to take any appropriate action to stop. In every instance, and many times in the presence of witnesses, Schick would accost the Complainant in the Complainant's performance of duty. Complainant believed that Schick's actions were motivated by jealousy (new bull in the corral syndrome). Complainant would later learn that Schick believed he would have the Complainant's job if the Complainant were out of the picture. When others, including investigating officers, asked Schick why he did those actions Schick's best excuse was that he "didn't like" the Complainant. Complainant denies ever instigating or antagonizing Schick and believes that the identified discriminating officials

(IDOs) (IDO-Johns and IDO-Bruner) coached Schick into pretext excuses after Schick was arrested (the second time) for assaulting the Complainant and when the Complainant made it clear that he was documenting the incidents in 1989. Schick's pretext excuses never indicated being antagonized before that point. Complainant's relationship with Parisi became strained in 1989 when Parisi objected to two non-malicious incidents that the Complainant committed in jest. IDO-Bruner used those two instances (with other instances that were never before addressed) to recommend that the Complainant be removed (terminated) from civil service. IDO-Bruner's recommendation to remove was mitigated to a proposed five-day suspension by the CNWS Human Resources Office. During this adverse action the Navy never mentioned the 29 March 1989 letter by Chief Union Steward Rosploch representing Parisi and addressed to IDO-Bruner, a document that would have strong pertinence in this disciplinary matter. (see CD-Rom, Exhibit 4, better explained below

IN RESPONSE TO: page 9, last paragraph) The Complainant challenged the severity of IDO-Bruner's imposed punishment in a meeting with IDO-Bruner's supervisor, Public Works Officer, Navy Commander Wegener. Complainant cited formal managerial procedures that IDO-Bruner bypassed including the lack of counseling for any of IDO-Bruner's supporting incidents. Other preliminary steps that IDO-Bruner bypassed to support the five-day suspension includes a letter of caution, an oral warning, a written warning, and a reprimand. The Complainant accepted responsibility for his actions, apologized, sought amends to act more professionally, and agreed to enter counseling through the Civilian Employee Assistance Counseling (CEAP). Wegener mitigated the proposed five-day suspension to a letter of caution, a non-disciplinary action which was not to be filed into

Complainant's personnel folder and would be expunged after one year (see CD-Rom, Exhibit 5, at paragraph 4.). The IDOs (Johns and Bruner) would use that expunged letter of caution and the incidents used to support that letter of caution against the Complainant in support of unwarranted disciplinary actions in 1992. And the Complainant alleges the IDOs did so in retaliation after the Complainant filed discrimination and reprisal claims naming Johns and Bruner as identified discriminating officials (IDOs).

Complainant's relationship with Parisi was strictly business after completing CEAP in 1991 and the Complainant amicably shared a work area with Parisi without a problem. Soon after filing EEO complaints in 1992 the IDOs ordered the Complainant to move his toolbox to an area of the shop that had insufficient lighting and no electrical or pneumatic outlets. Complainant made an issue to the EEO counselors about the IDOs' disparate decision to segregate the Complainant. The IDOs falsely claimed to EEO counselors that investigated the complaint that the Complainant was moved into that work area at his own request. The relationship between the Complainant and Parisi turned hostile after EEO investigations in 1992 whereby the Complainant identified Parisi as a similarly situated employee receiving favoritism by the IDOs. Parisi began to antagonize Complainant by leaving shop machines dirty and locking away shop's tooling (against direct orders from both IDOs and against an interim EEO agreement between the IDOs and EEO counselors to allow Complainant equal access to shops tooling). Although the relationship between Complainant and Parisi was strained, only one confrontation on 16 July 1992 (see CD-Rom, Exhibit 6) was serious enough for the Complainant to warrant documenting before Parisi assaulted Complainant on 30 July 1992. It was the IDO managers, Johns and

Bruner, who condoned workplace hostilities and participated in a pattern of nationally and race based harassment and it was the Navy that supported those IDOs by refusing the Complainant due process, restricting the Complainant from his work station, controverting Complainant's injury claims, withholding Complainant's pay after the Complainant was injured in a workplace assault on 30 July 1992 and again after a double-amputation injury on 6 June 1995, altering the terms of the Complainant's employment by displacing the Complainant from the machine shop and ordering the Complainant to remove his machinist's tools, and by other acts that point to a pattern of reprisal because the Complainant pushed forward with a total of four EEO complaints between March 1992 and March 1993.

Page 8, 1st paragraph, last sentence

IN RESPONSE TO: . . . "which created a hostile work environment because of his national origin which management ignored."

COMPLAINANT'S RESPONSE: should read " . . . which created a hostile work environment which management ignored because of his national origin."

This is another example of the careful scripting by the EEOC Hearing Examiner (a.k.a. Administrative Judge) to deflect the racial animosity of the identified discriminating officials (IDOs) who protected the violent and abusive actions of non-minority bullies who assaulted their minority co-workers. The bullies received minimal or no disciplinary action and the IDOs painted the abused minorities as instigators to investigating authorities including Navy Command, Department of Labor OWCP, Navy Security, City of Concord Police, and EEO Investigators.

Page 8, 2nd paragraph

IN RESPONSE TO: "The primary focus of Complainant's case involves his allegations against Schick and Parisi and, in effect, constitutes a claim of ethnic based hostile environment discrimination."

COMPLAINANT'S RESPONSE: Complainant sees this statement as a straw-man fallacy by declaring that the allegations against Schick and Parisi constitute the Complainant's claim of ethnic based hostile environment discrimination. The Complainant clearly identifies the IDOs in his complaints as condoning the hostilities by Schick and Parisi. Complainant also cites the other disparate treatment and circumstantial discrimination by the IDOs Johns and Bruner as managed discriminating and retaliating behavior. The hostilities were just one element of circumstantial ethnic based discrimination by Navy managers upon the Complainant and other minorities at Concord Naval Weapons Station (CNWS).

Page 8, 4th paragraph

IN RESPONSE TO: guidelines to prevail in a claim of ethnic based hostile environment discrimination.

COMPLAINANT'S RESPONSE: Complainant meets all of the standards as follows:

Was the conduct complained of based on the employee's protected status under the law? Complainant alleges that IDO-Bruner never wanted a minority in his scheme to an all non-minority shop and can substantiate that claim by IDO-Bruner's (mostly White friends) hiring practices and by his all-White shop roster (see CD-Rom, Exhibit 7). IDO-Bruner placed the Complainant under supervisor IDO-Johns so that IDO-Bruner could discriminate and retaliate against the Complainant. Complainant

had already identified IDO-Johns to IDO-Bruner as hostile for not taking actions against Schick when IDO-Johns was Schick's supervisor and witnessed at least three incidents of confrontations instigated by Schick upon the Complainant and yet neither IDO ever took remedial action. As the Complainant's supervisor, IDO-Johns made racial slurs to the Complainant and participated in partnership with IDO-Bruner to alter the Complainant's performance appraisals, provide favoritism to other protected groups, act disparately to Complainant (and other minorities), and condone workplace hostilities.

Was the conduct excessive and opprobrious? Complainant supports his issues with documented hostilities and violence which were mishandled by the IDOs, with slanderous and libelous statements by the IDOs, with inappropriate and unwarranted disciplinary actions initiated by the IDOs, with an unwarranted base restriction, with unwarranted actions to controvert Complainant's OWCP injury claims after traumatic workplace injuries, and with multiple violations of due process and civil rights in dealing with the Complainant. The Complainant asserts that the disparity and hostilities intensified after filing his first formal complaint in 1992 (see CD-Rom, Exhibit 8) and that those acts support strong claims of reprisal that the Navy and EEOC refuse to consider (EEOC AJ focuses Complainant's reprisal claims solely on the 1985 action).

Were reasonable steps taken by management to correct conduct, or prevent it from occurring once identified? Not only did Navy managers fail to take corrective actions, but the IDO managers went as far as to support the non-minority assailants. The IDOs suppressed the facts by their inappropriate investigations and also suppressed attempts by the Contra Costa District Attorney's effort to mediate a shop conflict (see CD-Rom, Exhibit 9).

Page 9, 2nd paragraph

IN RESPONSE TO: . . . "Complainant's hostile environment allegation is predicated solely on his interactions with Schick and Parisi", . . .

COMPLAINANT'S RESPONSE: The hostile work environment that the Complainant cites was predicated by the identified discriminating officials (IDOs), Johns and Bruner, who allowed and protected Schick to bully the Complainant over several years despite Complainant's documented history of identifying Schick as a harasser and assailant.

Parisi was angered about being identified as a similarly situated employee who the IDOs provided favoritism to by hiring, training, terms of employment and also by protecting Parisi after assaulting the Complainant in the federal workplace on 30 July 1992.

Complainant cites several examples of hostilities by the IDOs, which include harassing and yelling at Complainant while he worked with moving machinery; attempting to force Complainant into hostile meetings without the Complainant's representative; slandering and libeling the Complainant to other managers and co-workers; altering Complainants performance appraisals; denying Complainant due process; using bogus charges for disciplinary actions; and by other disparate treatment (see CD-Rom, Exhibit 8) (not all inclusive).

Page 9, last paragraph

IN RESPONSE TO: . . . ; "March 29, 1989 letter written by the chief union steward (should be Rosploch) to General Foreman Bruner on behalf of Parisi, in which Bruner is warned that if Parisi was provoked into using physical force against the Complainant and civil

action was taken against him, he (Parisi) would hold management responsible"; . . .

COMPLAINANT'S RESPONSE: Complainant sees the 29 March 1989 letter (see CD-Rom, Exhibit 4), that was prepared by Rosploch representing Parisi and addressed to IDO-Bruner, as "smoking gun" evidence of federal workplace corruption and mismanagement under IDO-Bruner.

The President of the CNWS American Federation of Government Employees (AFGE) Local 1931 Union during the time in question, James Wright, will confirm that it is not the position of Union officials to represent unit employees in matters against other unit employees. Wright will also confirm that the 29 March 1989 letter in question, which was written on Union letterhead, was not sanctioned by the AFGE Union and that he had no knowledge of the letter's existence until after 30 July 1992 when it was provided to the Contra Costa County District Attorney to defend Parisi's assault upon the Complainant.

Besides being the Chief Union Steward for AFGE Local 1931, John Rosploch was also one of the three machinists within the Concord Naval Weapons Station (CNWS), Public Works Department (PWD) under IDO-Bruner (the other two machinists being Parisi and the Complainant-Cendejas) (See CD-Rom, Exhibit 7). Complainant's first-ever contact with Rosploch was in 1985 when Rosploch personally informed the Complainant [who was a WG-10 Machinist under a separate Union at Mare Island Naval Shipyard in pursuit of the WG-11 Machinist position at Concord Naval Weapons Station, Public Works Department (CNWS-PWD)] that AFGE Local 1931 would not pursue Complainant's grievance for the WG-11 Machinist position. Complainant then turned to the CNWS-EEO

to pursue the position. Complainant alleges that Rosploch was a political agent of IDO-Bruner who played a big part in supporting the discriminating official by damning the Complainant in many instances and that Rosploch did so in exchange for workplace favoritism that was not afforded to the Complainant (time off, monetary awards, clean and safer work assignments, etc.). Rosploch solicited other Union officials to not represent Complainant and informed and advised IDO-Bruner of Union activities. Rosploch gave damning false witness interviews against the Complainant to CNWS-EEO counselors who investigated the complaints in 1992. It was Rosploch (who was also the CNWS locksmith for several years) that supposedly found a knife in the Complainants secured work locker after the Complainant was disabled and away from work because of the 30 July 1992 federal workplace assault by Parisi. Rosploch even sought to impose his own disciplinary action upon the Complainant on 23 June 1987 while Rosploch was sitting in as a temporary supervisor.

The first time that the Complainant ever saw a copy of the 29 March 1989 letter was when it was provided to the Contra Costa County District Attorney to defend Parisi's 30 July 1992 assault upon the Complainant. The Navy provided a copy of the 29 March 1989 letter as a discovery document for the 19-20 July 1994 administrative hearing. On that copy is a hand written notation in the upper right-hand corner by Navy Public Works Officer (PWO) Wegener (who was IDO-Bruner's boss). Parisi had hand delivered a copy of the 29 March 1989 letter to Wegener on 30 July 1992 at 08:00 a.m., less than one hour before Parisi assaulted the Complainant with a vicious kick to the chest while the Complainant was sitting and talking on the telephone. Upon accepting the letter from Parisi and reading Parisi's reference to violence upon

the Complainant, Wegener made the following handwritten note in the upper right corner: "Received from M. Parisi at 0800 (on) 7/30/92. – Showed to B. Bruner – he says he never saw it before – (signed) G. Wegener (dated) 7/30/92."

In a 28 July 1993 Management Respondent Information Fact Sheet, Wegener states, "Parisi gave me (Wegener) a copy at about 0800." Wegener also states that he "immediately questioned Bob Bruner about the memo, particularly because of the reference to Parisi using physical force." Wegener further states, "Bruner denied having seen the memo although he recalled the meeting." And finally Wegener states, "(Bruner) said that there had been no discussion about Parisi using physical force with Cendejas."

In IDO-Bruner's testimony at the 19 July 1994 hearing Bruner admits "receiving a copy of the letter and telling his boss about it" (19 July 1994 hearing transcripts pg.134). IDO-Bruner also testified that he then told Parisi "That in no way, shape or form would he (Bruner) condone him (Parisi) using physical force and he would suffer any responsibilities of it"...(19 July 1994 transcripts pg.133).

So it is apparent that Parisi hand-delivered a copy of the 29 March 1989 letter to Wegener at 0800 hours on 30 July 1992, less than one hour before Parisi assaulted the Complainant. It is also apparent that Wegener immediately showed the letter to IDO-Bruner and that Bruner then claimed to his boss Wegener that [he] had never seen the letter before.

If IDO-Bruner is not lying under oath it is clear that Parisi had forewarned IDO-Bruner "of using physical force" upon the Complainant as early as 29 March 1989. In any case it is clear that Parisi had forewarned Navy managers of the same message on 30

July 1992, less than an hour before Parisi did in fact assault the Complainant, and that those Navy managers failed to take prompt and appropriate corrective action to stop the forewarned assault by Parisi upon the Complainant.

Page 10, last paragraph

IN RESPONSE TO: "... there was absolutely no evidence presented to indicate that any of these incidents ... was predicated in any way upon his race or national origin ..."

COMPLAINANT'S RESPONSE: The Navy acknowledges a multitude of long-standing disputes and aggressive behavior but cannot show a proactive response to the hostile workplace. Instead, the Navy supported the IDOs' condonation of several instances of identified hostile work environment that the Complainant sees as a pattern of invidious circumstantial discrimination and retaliation for filing discrimination claims, including the discrimination claim that the Complainant made to procure his position in 1985. These hostilities intensified after the Complainant filed discrimination complaints against the IDOs in 1992 and 1993 (see CD-Rom, Exhibit 8). The IDOs had full knowledge of the conditions, failed to take prompt and appropriate corrective actions, and in fact protected the assailants by siding with them and taking minimal, or no, or unequal discipline against them as compared to discipline taken against the Complainant.

Page 11, last paragraph

IN RESPONSE TO: 14 October 1987 Schick incident – ...; "that Schick was yelling and was out of control; and that he did not hear Complainant provoke Schick."

COMPLAINANT'S RESPONSE: The EEOC Administrative Judge (EEOC AJ) acknowledges an early incident of verbal assault by Schick and that the incident was unprovoked by the Complainant. This particular incident escalated into Schick physically assaulting the Complainant wherein Schick was subsequently arrested. The subject was discussed in testimony and Complainant provided statements and police reports for the 14 October 1987 Schick incident at the 19&20 July 1994 EEOC administrative hearing, yet those facts are omitted from the EEOC AJ's report. No actions were ever taken by the IDOs to mediate or resolve the conflicts because the IDOs were condoning the behavior in support of their racial prejudice against Hispanics just as was done in the Vigil case. Complainant saw Schick as IDO-Bruner's protected thug. Although it has been acknowledged that Schick was "yelling and was out of control" and that Schick was loud and aggressive, even to his supervisor, the IDOs never disciplined Schick or advised Schick to take part in the Civilian Employee Assistance Program (CEAP) as the IDOs did with the Complainant.

Page 12, 1st paragraph

IN RESPONSE TO: . . . "the two incidents Complainant emphasized at the hearing, those that occurred on July 28 and July 30, 1992."

COMPLAINANT'S RESPONSE: Complainant wishes to elaborate on these two incidents solely by providing documentation that was available to the Navy (in defense of three disciplinary actions initiated by the IDOs that were rescinded at the fourth-step grievance procedure), to OWCP (in defense of Navy action to controvert injury claims)(see CD-Rom, Exhibit 11, 14 Aug 1992 & 17 Aug 1992), and to the EEOC.

Regarding the events of 28 July 1992 please see CD-Rom, Exhibit 10. The evidence will show that Schick left the Complainant's office and accosted the Complainant in the Complainant's predetermined space and in the presence of several witnesses. Several variations of what actually happened on 28 July 1992 (time differences, death threats, witness statements) were provided to the station commander at the fourth step grievance procedure and ultimately induced the commander to rescind the adverse disciplinary actions that the IDOs supported with these incidents.

Regarding the events of 30 July 1992 please see CD-Rom, Exhibit 11.

The evidence in both instances overwhelmingly supports the Complainant's claims of circumstantial discrimination and reprisal.

Page 13, 1st paragraph

IN RESPONSE TO: "Pat Day was present on this occasion, as well . . . "

COMPLAINANT'S RESPONSE: It should be noted that Pat Day and Schick were friends from childhood and that, although the Complainant was treated fairly while under the supervision of Day, Complainant believes that Day would never implicate Schick in wrongdoing. Day's selective memory and account of the 28 July 1992 incident protects his longtime friend (Schick) and himself from culpability (failure to intercede or discipline). Day did not arrive at the scene until after Schick began yelling and Gamble interceded.

Page 13, 2nd paragraph

IN RESPONSE TO: . . . "when he (IDO-Bruner) did interview Gamble about this matter Gamble told him

very little and did not present the statement (that) he said he would provide (testimony of Bruner).

COMPLAINANT'S RESPONSE: IDO-Bruner falsely testified that he had interviewed Student Aide Ricardo De Luna and Tool Room Attendant Fred Gamble. Both De Luna and Gamble (in 20 July 1994 transcript of testimony, pg.454) deny that IDO-Bruner ever approached them for an interview concerning the 28 July 1992 verbal assault by Schick. IDO-Bruner cannot provide any documentation to support his claim that he did an appropriate investigation by seeking other witnesses to the incident because IDO-Bruner says he destroyed the records even though Bruner knew that those records were pertinent to the Complainant's discrimination and reprisal claims.

Both Complainant and Complainant's representative informed IDO-Johns and IDO-Bruner that statements had been provided to the Union yet the IDOs made no attempt to request them from the Union. The last line of IDO-Johns 30 July 1992 statement reads "Mr. Cendejas said that I would have to get it (the statement concerning the 28 July 1992 Schick assault incident) from the Union."(See Johns statement in CD-Rom, Exhibit 11).

Page 14, first paragraph

IN RESPONSE TO: Bruner's testimony regarding his decision to discipline the Complainant for the 28 July 1992 altercation.

COMPLAINANT'S RESPONSE: As before on numerous occasions, IDO-Bruner bases a disparate decision against the Complainant with unsubstantiated "probability" ignoring witnesses, proximity, who approached whom, and prior complaints and assaults.

Page 14, second and third paragraph

IN RESPONSE TO: Bruner's testimony regarding timeliness of 28 July 1992 statements.

COMPLAINANT'S RESPONSE: First, Complainant does not regard witness De Luna, who was a local high-school student temporarily working at Concord Naval Weapons Station as a summer aide, as "Complainant's witness," but rather as an unbiased witness who happened to be the closest to the altercation. Second, both IDO-Bruner and IDO-Johns were aware that the statements were available at the Union office on station but never attempted to procure them OR interview De Luna or Gamble.

Page 14, last paragraph

IN RESPONSE TO: Wegener's testimony that ". . . the Complainant and Gamble were working the thing together, or had staged the confrontation in front of the tool room."

COMPLAINANT'S RESPONSE: It was IDO-Johns that instructed Complainant to wait outside the tool room while IDO-Johns went to the office to get a dispensary slip (Johns refused to allow Complainant accompany him to the office). It was Schick who left Johns' office and approached the Complainant with a menacing look that caused the Complainant to call out for Gamble. If anybody set up the situation it was an angry IDO-Johns who allowed Schick to leave his office to accost the Complainant (Schick most probably saw the green light to do so).

Complainant saw Schick go into IDO-Johns' office and then emerge several seconds later to directly approach the Complainant at the tool room window with a look on his face that the Complainant recognized from several previous confrontations. The Complainant turned

to face the tool room through the window with his back to Schick and called to advise Gamble that Schick was approaching him in a threatening manner. De Luna happened to be standing at the window just inside the tool room at the time and Gamble was seated at his desk just behind De Luna. De Luna, Gamble and Complainant were all within six feet of each other when Schick passed behind the Complainant, and then Schick came back to accuse the Complainant of instigating a confrontation. (See all witness accounts on CD-Rom, Exhibit 10).

Page 15, 1st paragraph

IN RESPONSE TO: "No claim or any evidence exists to indicate that Schick had instigated anything with the Complainant that day prior to this incident."

COMPLAINANT'S RESPONSE: The EEOC AJ carefully scripts this statement so as not to consider several incidents prior to this day where Schick accosted the Complainant and instigated an altercation. The most recent incident where Schick had accosted the Complainant was only one week before when Schick approached the Complainant in the Complainant's supervisor's office (a separate area from Schick's supervisor's office) and accused the Complainant of placing an obscene note into Schick's work vehicle (see CD-Rom, Exhibit 12)

Page 15, footnote[6]

IN RESPONSE TO: EEOC Administrative Judge Cosentino's footnote stating (Complainant cannot) "adequately explain his need to call out Gamble's name before Schick had done or said anything to him."

COMPLAINANT'S RESPONSE: The Complainant recognized the hostile look in Schick's eyes as Schick

approached him and called to Gamble in a "fight or flight" response.

Page 15, last paragraph

IN RESPONSE TO: "What is clear, as in the above (28 July 1992) case, is that the incident posed a legitimate question as to whether Parisi was provoked by the Complainant, . . . "

COMPLAINANT'S RESPONSE: Is the Complainant to understand that the EEOC AJ is defending the Navy's irresponsible response to physical and verbal assaults upon the Complainant because those assaults "might have been" instigated by the Complainant? Do words (said or unsaid) constitute physical assault? All evidence points to the more probable truth that in each instance the Complainant was the victim of unprovoked assaults and that in every case of assault upon the Complainant it was the assailants who approached and instigated the situation upon the Complainant.

Page 16, 3rd paragraph

IN RESPONSE TO: EEOC AJ's account of Pieterick testimony "Pieterick admits that he did not see Complainant push Parisi, and although he heard the two arguing . . . "

COMPLAINANT'S RESPONSE: Neither Pieterick's testimony (19 July 1994 transcript pg.43) nor his statement (CD-Rom, Exhibit 11) indicate that he heard "the two (both Parisi and Complainant) arguing" because the Complainant was not arguing with Parisi. In fact, Complainant was in telephone conversation with a third party, Annette Varela, who verifies the Complainant's events of 30 July 1992 (see Varela statement and all related documents related to the 30 July 1992 incident in CD-Rom, Exhibit 11). In an interview

with EEO counselor, Steve Kawakami, (on Tuesday, 15 September 1992) IDO-Johns falsely conveyed to Kawakami that "Pieterick said that the aggrieved (Complainant) pushed Parisi and Parisi was only defending himself when he kicked the aggrieved in the chest."[See CD-Rom, Exhibit 11, Page 11 of EEO Report, (located after City of Concord Police reports regarding the 30 July 1992 assault incident)]

Page 16, footnote

IN RESPONSE TO: footnote stating "Ultimately, Commander Wegener disciplined both the Complainant and Parisi for this incident."

COMPLAINANT'S RESPONSE: The Complainant should have never received discipline for being the victim of Parisi's assault. The discipline that was implemented was unequal when considering the facts and severity of the assault. Parisi's discipline was a letter of reprimand and Complainant's discipline was a five-day suspension.

Page 17, 3rd paragraph

IN RESPONSE TO: "The Complainant admits that Johns questioned him about this incident and that the report Johns filed was a fairly accurate rendition of what occurred."

COMPLAINANT'S RESPONSE: IDO-Johns' 30 July 1992 statement gives a fairly accurate account of the assault by co-worker Parisi and the events that happened after Complainant returned from the dispensary (see CD-Rom, Exhibit 11, Johns' 30 July 1992 statement). Complainant knew he would not be coming back into the hostile work environment until the PWC-SFB takeover on 5 October 1992 and informed IDO-Johns that any statements would come through the Union. Complainant was harassed and detained

by IDO-Johns when the Complainant asked to see his own personal physician because of the pain and injuries that he had received in the 30 July 1992 federal workplace assault (see CD-Rom, Exhibit 11, dispensary slip time-lines and written comments by IDO-Johns).

Page 17, last paragraph

IN RESPONSE TO: testimony of Wegener regarding the 30 July 1992 incident. . . . "that after this incident the Complainant was not available for comment; that the agency had very little contact with him; and that they could not get a statement from him even though he had been seen at various areas on base."

COMPLAINANT'S RESPONSE: Wegener's testimony is a pretext excuse for an inappropriate investigation into the 30 July 1992 incident. There were plenty of opportunities to speak with the Complainant. Navy officials acknowledge that the Complainant was available at the Union office and was seen going and coming from EEO meetings. Complainant also had contact with IDO-Johns and IDO-Bruner for their signatures needed on Department of Labor, OWCP documents (Complainant was harassed and detained when doing so). IDO-Bruner saw the Complainant at the front gate badge-and-pass office when IDO-Bruner told the gate guard not to allow Complainant onto the station after knowing the Complainant was cleared by security to come onto the station. Complainant also saw Wegener at the Union office in a meeting concerning the assault of another Hispanic co-worker John Vigil, yet Wegener never bothered to ask for a statement or even ask how the Complainant was doing. Wegener called Complainant's chiropractor, Dr. Micheal Gazdar, a month after the assault to ask if the injuries "could have been caused by a kick to the chest."

Page 18, 3rd paragraph

IN RESPONSE TO: . . . "no other employee reported having had similar problems with Schick and/or Parisi."

COMPLAINANT'S RESPONSE: If Wegener doesn't know about Schick and Parisi having their own problems with other co-workers it is because the IDOs (Bruner and Johns) protected those incidents from being heard. Schick was a known bully who also harassed at least two other co-workers (Rodney Raines and Paul Mullen) who confided in the Complainant when Schick was bullying the Complainant. Raines informed the Complainant that he (Raines) complained to IDO-Bruner about Schick's bullying behavior. Parisi got into a conflict with a customer in the high security "Q-area" that ended in a documented security matter.

If these problems with the Complainant were so prevalent why didn't managers provide counseling and remedial action at the onset? This is the crux of Complainant's argument.

Page 18, last paragraph

IN RESPONSE TO: "Wegener also testified that he saw absolutely no evidence of racial animosity being involved in any of these incidents", . . .

COMPLAINANT'S RESPONSE: This was not Commander Wegener's position when interviewed by EEO counselor, Steve Kawakami on Wednesday, 16 September 1992. Kawakami reports "He (Wegener) mentioned something about the VIGIL case and pondered if there was a similarity because both of the aggrieved individuals are Hispanic.... He said that he had hoped that racism wasn't the issue." At the time of that interview the only two Hispanic employees under

IDO-Bruner were off work after being assaulted by previously-identified-as-hostile non-minority employees. Wegener's subordinate, IDO-Bruner, had made such disparate statements to the Department of Labor, OWCP regarding the minority assaults that those statements had to be rescinded. Wegener also recalls discussing his second thoughts that racism might be an issue under his authority (see Wegener's testimony on 20 July 1994 hearing transcripts pg. 492). Wegener also thought enough about the issue to impose a mandatory viewing by all public works personnel to see a video about racism and diversity titled "Brown Eyes – Blue Eyes" while two Hispanic employees under his (and IDO-Bruner's) authority were away from work with disabling injuries from assaults by non-minority co-workers who were previously identified to IDO-Bruner as hostile toward their respective victims. It was too late for Wegener to admit to himself that he might have been duped by relying on the truth of the IDOs to support their discrimination upon Hispanics. In that sense, the Navy was negligent to support the IDOs disparate treatment upon the Complainant, especially after the Complainant had previously identified the IDOs as discriminating and retaliating managers in 1992.

Page 20, 2nd paragraph

IN RESPONSE TO: Schick's testimony . . . "that he and the Complainant both had been instructed on more than one occasion by management officials, including Bruner, to stay out of each others way."

COMPLAINANT'S RESPONSE: If this was the case then why did Schick approach and assault the Complainant at the Complainant's work center on 21 July 1992? (See CD-Rom, Exhibit 12). And why did Schick again approach and assault the Complainant

from the Complainant's supervisor's office on 28 July 1992? (see CD-Rom, Exhibit 10).

Page 20, 3rd paragraph

IN RESPONSE TO: Schick's testimony regarding 12 May 1989.

COMPLAINANT'S RESPONSE: Schick's claims for approaching the Complainant are false. Complainant was having lunch at the Enlisted Mens Club when Schick came looking for his tool bag that Schick had earlier left there. The bag was several feet away from the Complainant on the floor just where Schick had left it. Shick gave shaky testimony regarding this incident in which he first denies telling Complainant to "stay out of the club," and then Schick admits saying the statement to the Complainant (20 July 1994 transcripts pg.386)

The 12 May 1989 Schick incident is unique in that it happened while IDO-Bruner was away from work and it happened in the presence of his temporary replacement, Robert Vandiver, and another co-worker Fred Rawson. Although their statements cannot corroborate the Complaint's [sic] claim that Schick physically assaulted the Complainant, the statements concur in every other way. (See CD-Rom, Exhibit 13, documented statements of prior assaults by Schick upon Complainant).

Page 22, 1st paragraph

IN RESPONSE TO: EEOC AJ's comments regarding Rosplosch's statements to EEO counselors. . . . "Complainant pointed his finger at people like he had a gun . . . "

COMPLAINANT'S RESPONSE: Complainant denies ever making any such motions to anybody other than coworker Paul Mullin. Complainant had taken Mullin,

who was a hearing disabled friend, to play paintball and had a running game with Mullin as to whom would see the other first while working throughout the station. Complainant believes that others may have witnessed him and Mullin in this "saw you first, got the draw on you" game and perpetrated a common story with IDO-Bruner's assistance (the statements read that way). The Complainant NEVER made such motion to or at any other coworker at any time. Navy managers have never discussed this behavior with Complainant. Complainant sees this action as a very serious allegation that attacks the Complainant because of his paintball sports activities. If such a thing ever did happen to Rosploch he would have immediately reported and documented it, yet Rosploch made no such accusations until being interviewed by an EEO counselor.

Page 23, last paragraph

IN RESPONSE TO: "Record evidence reveals that the ALJ who heard Complainant's workers' compensation case concerning the assaults . . . found insufficient evidence that those incidents occurred as Complainant related them . . . ;"

COMPLAINANT'S RESPONSE: Complainant made two claims of emotional condition caused by his hostile work environment as managed by the IDOs, Bruner and Johns. Both claims were appealed and have since been accepted by the Department of Labor, Office of Workers' Compensation (OWCP).

Page 24, top of page

IN RESPONSE TO: "He wore camouflage clothes and brought a bow and arrow to work"

COMPLAINANT'S RESPONSE: The Complainant had several pairs of camouflage clothing available from

sponsors of his off-station paintball activities and wore the comfortable fitting clothing under his coveralls. There was no dress code disallowing camouflage clothing. Other workers on the base wore camouflage clothes without an issue.

Complainant, who was a tournament archer, had a security pass that permitted him to have the bow and arrows and never took the bow and arrows out of the case. Complainant stopped bringing bow and arrows when Rosploch made it an issue with IDO-Johns.

Page 24, 1st full paragraph

IN RESPONSE TO: "... five written complaints from Schick to Johns dating back to January 1990" ...

COMPLAINANT'S RESPONSE: Schick's written complaints support a documented history of hostile workplace conditions that spans several years and include several incidents. Schick's written statements also support the Complainant's claims that Navy managers were aware of the hostilities, yet failed to take prompt and appropriate action to mediate. It was the Complainant who was insisting on mediation in 1992 where it should have been the Navy in 1987.

Many of the complaints within Schick's written statements are exactly what Schick was perpetrating on the Complainant in front of witnesses. Schick cannot provide one witness to support any one of his allegations within his complaints. Schick's written statements contain loaded words used in other documents against the Complainant and indicate that IDO-Bruner was advising Schick.

In testimony, when Schick was asked what started the conflict between him and the Complainant, Schick said it began when somebody left an orange peel on his desk and he assumed that it was the Complainant.

The Complainant had never heard the orange peel story before. Schick never supported the story by showing that the Complainant had anything to do with the orange peel left on Schick's desk (20 July 1994 transcripts pg.421). Schick's own testimony and behavior throughout the hearing belie his credibility. What Schick's testimony and EEOC AJ Cosintino's decision do not portray is Shick's hostility and aggression at the proceeding. Schick refused to participate and had to be escorted to the hearing by two Navy security personnel who stayed throughout Schick's testimony. At one time during the hearing Schick yelled, "I don't give a damn!" as he pounded his fist on the table (20 July 1994 transcripts pg.400).

Schick was a much larger person than the Complainant (6ft+, 200+ lbs. Vs. 5ft., 8in., 145 lbs.) and the Complainant was in constant fear of being physically attacked by Schick. It doesn't make sense that the Complainant would antagonize a much larger bully after having identified Schick as one cause of Complainant's hostile working conditions. Schick's claims that the Complainant antagonized him are a pretext made to justify Schick's bullying behavior because just saying that "he didn't like" the Complainant did not justify his actions and got him arrested.

Page 25, 1st paragraph

IN RESPONSE TO: Al Johns' use of the Spanish word "si"

COMPLAINANT'S RESPONSE: The actions by IDO-Johns were deliberate and excessive and were made to the Complainant in a purposeful derogatory manner even after Complainant informed IDO-Johns that the comment offended the Complainant. The "si" word was not used in context (answering in the affirmative), but rather as a slur that was made in mixed

company with a "Frito Bandito" accent for a reaction. Complainant had a strictly-business relationship with IDO-Johns and to suggest that the slur was made in jest by IDO-Johns is a pretext excuse. IDO-Johns' use of the word in the manner and context he used it points to nothing more than a malicious slur by an identified discriminating official who, during the same time period demonstrated multiple other instances of malicious behavior upon the Complainant (imposing unwarranted disciplinary actions, yelling at the Complainant while the Complainant worked with moving machinery, taking part in altering Complainant's performance appraisals, etc.)

The EEOC has held that comments, such as those that invoke a persons race, religion, or ethnic background, serve no useful purpose.

Page 25, last paragraph

IN RESPONSE TO: ". . . I find that the Complainant has failed to establish a prima facie case of hostile work environment discrimination, . . . "

COMPLAINANT'S RESPONSE: EEOC AJ Cosentino ignores an established finding of prima facie by EEOC investigator, Art Alveraz, and by the Agency representative, Mark Commerford (within Agency Post-Hearing Brief), who both admit to findings of prima facie retaliation. Complainant's retaliation claims after filing EEO complaints in 1992 and 1993 are strong but EEOC AJ Cosentino focuses his retaliation findings from complainant's 1985 complaint so as to rely on the length of time to dismiss the retaliation complaint. Largely ignored is Complainant's most strong case of retaliat[illegible] after filing EEO complaints in 1992 and 1993. The [illegible]epartment of Labor, Office of Workers' Compensation has found that the Complainant suffered compensable physical and

emotional injuries from his hostile workplace environment, which strongly supports the Complainant's retaliation claims.

Page 26, 1st full paragraph

IN RESPONSE TO: . . . "I cannot find that Bruner failed to properly investigate his (Complainant's) allegations of harassment, or that he suppressed any evidence, because of his EEO complaints.

COMPLAINANT'S RESPONSE: How can such a statement be made when IDO-Bruner has admitted that he destroyed many of the pertinent records while the EEO case was being investigated? The investigations that are available are clearly incomplete by not acknowledging pertinent witnesses and available statements. The identified managers never took actions to ensure a workplace free from a hostile, discriminatory and offensive environment for the minority worker. In all of the documented confrontations the managerial actions have been prepossessed against the Complainant, just as was done with other minorities (Vigil). The IDOs resisted attempts by Union officials, EEO officials, and the Contra Costa County District Attorney (see CD-Rom, Exhibit 9) to monitor the workplace, conduct remedy, and take corrective action.

Page 26, 2nd paragraph

IN RESPONSE TO: What the records show is that Bruner was always confronted with conflicting stories, as well as witnesses who could either provide no corroborating evidence, or who did not submit statements until well after the events in question.

COMPLAINANT'S RESPONSE: The record shows that Navy managers were aware of numerous assaults and confrontations, many of which were documented with

witness statements, police reports, and meetings, yet managers never took remedial action until compelled to do so by the Complainant's insistence in 1992. That mediation never happened because IDO-Bruner would not allow the Complainant his choice of representative. IDO-Bruner then took adverse action against the Complainant for refusing to participate in the meeting without his representative. Though some of the incidents conflict by the versions presented substantiated details by the victim, witnesses, and even the assailants of the Complainant do not support the versions or actions of the identified discriminating officials. IDO-Bruner's handling of both Hispanic cases clearly show a blatant and malice bias toward minorities. The Complainant was trying his best to abide by professional standards of conduct after counseling through the Civilian Employee Assistance Program in 1991, but the IDOs denied the Complainant a fair chance to succeed. There is no evidence that any of the conflicts that led to the Complainant being assaulted were provoked by the Complainant. Instead, the records point to several instances of IDO-Bruner's moiling animosities toward the Complaint that support Complainant's case of invidious circumstantial discrimination.

Page 27, 1st full paragraph

IN RESPONSE TO: . . . "and because no other evidence of a retaliatory intent has been presented" . . .

COMPLAINANT'S RESPONSE: The Complainant has provided several circumstances of retaliation within the case including IDO-Bruner's withholding of sustained superior performance (SSP) awards from the Complainant while providing awards to all of the other non-minorities. Other examples of retaliatory intentions include failure to mediate known conflicts in the workplace, disparate treatment of minorities

and favoritism (training, rules, overtime, hiring, etc.) to non-minorities.

Page 27, 1st full paragraph, last sentence

IN RESPONSE TO: . . . "Bruner was not hostile or irritated when he (EEO counselor Paul Rankin) questioned him about Complainant's complaints."

COMPLAINANT'S RESPONSE: On 14 May 1992, EEO counselor Robert Teixeira met with IDO-Bruner and notes that "Bob's opening remark was, 'What does that S.O.B. want now.'" During that same meeting IDO-Bruner told the following unfounded story to Teixeira: "That when Rick was at Mare Island, he stood on a chair with a rope around his neck and his co-workers turned away and walked off, leaving the supervisor to take Rick down from the chair." (2 June 1992 Teixeira report) (also see in response to Page 34, 1st & 2nd paragraph below).

On 15 September 1992, EEO counselor Steve Kawakami met with IDO-Bruner and notes that "He (IDO-Bruner) said that he doesn't think that the aggrieved is all there mentally – he thinks that the aggrieved is mentally ill." And that . . . some of his (IDO-Bruner's) employees probably think of him as an asshole." (26 October 1992 Kawakami report).

Page 27, last paragraph

IN RESPONSE TO: . . . "supervisor Day's belief that Bruner had just made a comment on the appraisal and had not actually changed a rating". . .

COMPLAINANT'S RESPONSE: Proper procedure prescribes that the second-line supervisor review the rating before it is presented to the employee for final signature. Supervisor Day initialed a written comment that IDO-Bruner had made after Complainant's

final signature. IDO-Bruner then used white-out to cover the outstanding grade to downgrade Day's appraisal. IDO-Bruner was the last in the chain of custody to handle the performance appraisal before the appraisal was placed into the Complainant's personnel file. IDO-Bruner is ultimately responsible to make sure that the Complainant knows of any changes and also that the Complainant be allowed to review and provide his final signature before the performance appraisal is placed within his personnel file. The fact remains that this annual performance appraisal was adversely changed and placed within the Complainant's personnel file without the Complainant's knowledge and that this is but one of three separate performance appraisals that were found to be inappropriately altered and placed into the Complainant's personnel file when the Complainant reviewed his personnel file in 1993. The Complainant would also find copies of rescinded disciplinary actions, an inappropriately placed letter of caution, and other derogatory information upon his review of his personnel file.

Page 29, middle paragraph

IN RESPONSE TO: Complainant's comment for more feedback on his 1992 evaluation (appraisal).

COMPLAINANT'S RESPONSE: Complainant's comment was one of several attempts to identify his federal workplace situation and ongoing conditions. IDO-Johns allowed the Complainant to post the comment, then expostulated the next day. IDO-Johns promised that the comment would be attached and wrote a comment in the upper-left hand corner of the revised appraisal (the original appraisal had been cut and spliced so as to keep previous signatures intact) indicating the comment was attached. Before the appraisal was placed into Complainant's file one of the IDOs used a black permanent marker to cover IDO-Johns'

comment that a statement was attached and also removed the statement that was stapled to the appraisal.

Page 29, last paragraph

IN RESPONSE TO: . . . "the evidence reveals that the Complainant was not present at work to sign and receive this evaluation (appraisal)", . . .

COMPLAINANT'S RESPONSE: There is no viable excuse for placing the highly derogatory performance appraisal into the Complainant's personnel file without his knowledge or signature except to sabotage the Complainant's reputation with his future PWC-SFB employer. Navy managers were aware that the Complainant was available through the Union and EEO offices on station and also had contact with the Complainant when the Complainant came in to have OWCP documents signed (see initials on OWCP forms on CD-Rom, in Exhibit 11). Complainant also saw both IDOs when he came in to sign papers pertaining to the PWC-SFB transfer in September.

Page 30, 1st paragraph

IN RESPONSE TO: Complainant's assertion that Johns wanted to poison him with his new employer.

COMPLAINANT'S RESPONSE: It is documented fact that Complainant was displaced from the machine shop and assigned to work in the Utilities Division of PWC-SFB where he could be singled out as unnecessary (no machinists within other Utilities divisions within PWC-SFB). Within the first week Complainant experienced trouble related to the IDOs' slanderous poisoning. Complainant was ordered to remove his toolbox from the machine shop. IDO-Johns continued to badger Complainant even though IDO-Johns was no longer Complainant's supervisor (see CD-Rom,

Exhibit 8 statements and supporting documentation). An EEO counselor's report indicates that IDO-Bruner admitted speaking with Complainant's PWC-SFB supervisor, Don Coons, concerning the Complainant. Complainant was subsequently transferred to Mare Island Naval Shipyard and had to seek Union assistance to return to Concord Naval Weapons Station (CNWS). Complainant found altered appraisals and disciplinary actions imposed by the IDOs within his personnel file that were illegally supported by an outdated letter of caution (see CD-Rom, Exhibit 5). Many of these issues are identified within Complaint's [sic] fourth EEO Complaint and strongly supports Complainant's claims of retaliation for filing EEO complaints.

Page 30, last paragraph

IN RESPONSE TO: Failure to discipline Parisi for working on personal business at work.

COMPLAINANT'S RESPONSE: In early 1992, after the Complainant's first filing of an EEO complaint, the IDOs discussed stricter terms of employment and instructed all machinists to cease engaging in personal projects. On 28 July 1992 the Complainant pointed out Parisi's personal game carrier (for hunting) in the welders area after showing IDO-Johns that Parisi had also locked away shops tooling (against an interim EEO agreement and against orders by the IDOs). Complainant pointed to the disparate treatment and threatened to call the Fraud, Waste and Abuse to report the incident but Johns refused to allow the Complainant to use the office telephone. When the Complainant indicated that he wanted to go to the dispensary Johns ordered him to wait out at the tool room where Schick assaulted the Complainant minutes later. (See Exhibit 10, Complainant's statement)

Parisi was never disciplined for working on personal projects or for disobeying orders and an interim EEO agreement by locking away shops tooling, or for leaving the workplace without permission after assaulting the Complainant on 30 July 1992.

Page 31, 1st paragraph

IN RESPONSE TO: . . . "that he simply forwarded the letter to Complainant's new supervisor at Public Works"; . . .

COMPLAINANT'S RESPONSE: PWC-SFB supervisors do not corroborate this pretext excuse. By all evidence, besides his own testimony, Bruner was the last to be in custody of the letter of appreciation and never forwarded the letter of appreciation to the Complainant's new supervisor.

Page 32, 1st paragraph

IN RESPONSE TO: . . . "and that they (disciplinary actions) would only be removed based upon some final disposition on the grievance." . . .

COMPLAINANT'S RESPONSE: the disciplinary actions where discovered within Complainant's personnel file more than a week after they were rescinded. No action to remove those rescinded disciplinary actions occurred until after Complainant made his fourth EEO complaint identifying the derogatory files as an issue. Even after those files were removed there was tracking information left within the file that indicated disciplinary actions had been imposed on the Complainant. These disciplinary actions should never have been placed into the Complainant's personnel file for his new employer to review. The use of Complainant's outdated 16 January 1991 letter of caution to support those actions was clearly illegal. It doesn't make sense to place actions that are in active litigation into

a personnel file. Those disciplinary actions should have never been within the Complainant's file. Complainant cites the inappropriate decision to place these disciplinary actions into his personnel file as yet another malicious instance of circumstantial discrimination and reprisal by the IDOs and by the Navy.

Page 32, footnote

IN RESPONSE TO: the disciplinary actions are not being for disposition in the EEO forum.

COMPLAINANT'S RESPONSE: Complainant chose the grievances process because he needed urgent expedience to address adverse actions induced by Johns and Bruner after the Complainant filed discrimination and reprisal complaints naming Johns and Bruner as identified discriminating officials (IDOs). Complainant saw little or no action being taken to mediate workplace issues by using the EEO process. Interim agreements were being broken, his identified discriminating supervisors were treating him disparately, and the Navy was not being serious about remedial actions. Complainant knew he was being set up by the IDOs to be terminated before the PWC-SFB takeover. As such, Complainant cites administrative exhaustion as his reason for using the grievance procedure to defend against the disciplinary actions put upon him by the IDOs.

The Complainant's accepted OWCP claims and rescinded disciplinary actions support Complainant's claims of circumstantial discrimination and reprisal, yet the EEOC refuses to accept these issues for consideration. The Navy is claiming there were no adverse actions because those actions were never consummated by the fact that they were rescinded at the fourth step grievance procedure, yet by the time

those actions were rescinded the adverse actions had already been fulfilled. Complainant was indeed suspended and never was reimbursed for his suspension.

Page 33, 2nd paragraph

IN RESPONSE TO: "As to Johns role in this incident, the evidence reflects that Johns instructed Parisi not to lock the tool holders in his personal drawer; that Parisi locked them up again on a subsequent occasion; and that on a third occasion, Parisi put them in a common tool box."

COMPLAINANT'S RESPONSE: The tool holders were locked away from the Complainant on 28 July 1992 and on 30 July 1992, after Parisi had them in a common tool box on 16 July 1992 (see CD-Rom, Exhibit 6). In IDO-Bruner's testimony he states that he also instructed Parisi not to lock tools away (19 July 1994 transcripts pgs.135-136)

Parisi was never disciplined for disobeying IDO-Johns' and IDO-Bruner's direct orders (and an interim EEO agreement) to not lock the tool holders away from Complainant.

Page 34, 1st and 2nd paragraph

IN RESPONSE TO: Bruners' statements about Complainant's mental stability made to a security officer and to an EEO investigator.

COMPLAINANT'S RESPONSE: the EEOC AJ is wrong to support IDO-Bruner's pretext excuses for making derogatory comments about the Complainant's mental stability based upon unsubstantiated "rumors." IDO-Bruner's comments were inappropriate and demonstrate a retaliatory animus and an effort to sway criminal and EEO investigations in favor of the non-minority after the Complainant was assaulted on 30 July 1992.

In IDO-Bruner's own testimony he admits that he cannot provide one instance where the Complainant ever made a threat, physically assaulted, pushed, shoved, or kicked anybody (19 July 1994 transcripts pg.174).

There is no evidence on record that can corroborate that the Complainant ever "attempted to commit suicide when he worked at Mare Island" and the Complainant categorically denies that that ever happened.

There is no evidence or reason that other employees should fear the Complainant's bow and arrow, which the Complainant kept inside a case and had permission and a security pass to have.

The Complainant was away from work (because of the 30 July 1992 assault) and his work locker was secured when Rosploch (a locksmith) supposedly found a knife in the Complainant's work locker. This incident occurred *after* IDO-Bruner's derogatory comments about Complainant's mental stability were made to EEO and security, and therefore should not be cited as a reason for IDO-Bruner's comments to EEO and security. In IDO-Bruner's own testimony he speculates that the knife might have been planted in the Complainant's locker (19 July 1994 transcripts pgs.167&180-181).

What the evidence does show is that IDO-Bruner participated in campaign of vicious slander against the Complainant by alleging that the Complainant was "mentally unstable," subversive, and the cause and effect of trouble within the Complainant's workplace. IDO-Bruner's slander to other managers, to coworkers and to Navy security trickled back to harm the Complainant's relationships on station. (See CD-Rom, Exhibit 8). IDO-Bruner's actions constitute a

pattern and practice of nationality and race based harassment.

**PLAINTIFF'S EEOC COMPLIANTS [SIC] HISTORY**

A. NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT was granted to plaintiff on 10 September 1985 by Concord Naval Weapons Station EEO Counselor, Fred Jackson. Plaintiff's sought initial (first ever) EEO contact in early August 1985 to informally discuss discriminatory non-selection for a Maintenance Machinist position within CNWS-PWD.

B. Agency Case No. DON-92-60036-010(first three complaints consolidated), EEOC Case No. 370-94-X2450: plaintiff first sought EEO counseling on 17 March 1992 with Concord Naval Weapons Station EEO Counselor, Rod Palomino. Plaintiff again sought counseling on May 7 with Concord Naval Weapons Station EEO Counselor, Robert Teixeira, to report continuing discrimination, harassment for participating in a protected activity, and concerns that the Agency was not acting in good faith to resolve plaintiff's issues. Complaint went formal on 22 July 1992.

1) Description of Situation:

a) 17 March 1992 – "I have been denied equal opportunity for training, overtime, to perform supervisory duties, access to shop equipment, and general fair and equitable treatment. I have been continually harassed in the form of racial slurs, physical assault, verbal assault, unwarranted disciplinary actions, and being placed on a leave without pay status while at work on three separate occasions."

b) 7 May 1992 – Continuing discriminatory practices and reprisal by adverse action and negative evaluation.

2) Corrective Action Requested:

a) 17 March 1992 – "For all harassment and discrimination to cease and desist, Ltr of Reprimand removed from my official records, sick leave reimbursed, performance appraisal fairly and impartially reevaluated, reassignment from Supervisor Al Johns to Supervisor Pat Day, and immediate implementation and practice of fair and equitable treatment of all employees."

b) 7 May 1992 – "1. To have performance appraisal reevaluated fairly; 2. Access to all shops tooling available to other machinists; 3. A chance to act as supervisor as others have been doing on a rotating basis."

C. Agency Case No. DON-92-60036-010 (first three complaints consolidated), EEOC Case No. 370-94-X2451: plaintiff first sought EEO counseling on 1 October 1992 with Concord Naval Weapons Station EEO Counselor, Paul Rankin. Complaint went formal on 3 November 1992.

1) Description of Situation: "I have been denied due process in a timely manner concerning the handling of my EEO complaint formally filed 22 July 1992. I was not advised that the Command was withholding my complaint. I am not satisfied with the efforts made by the Command to resolve the issues, two of which have since escalated to cause reason for me to seek doctors care"

2) Corrective Action Requested: "For all harassment and discrimination to cease and desist, Ltr of Reprimand removed from my official records, sick leave reimbursed, performance appraisal fairly and impartially reevaluated, reassignment from Supervisor Al Johns to Supervisor Pat Day, and

immediate implementation and practice of fair and equitable treatment of all employees."

D. Agency Case No. DON-92-60036-010 (first three complaints consolidated), EEOC Case No. 370-94-X2452: plaintiff first sought EEO counseling on 6 August 1992 with Concord Naval Weapons Station EEO Counselor, Steve Kawakami. Complaint went formal on 3 November 1992.

1) Description of Situation: "1. Reprisal by disciplinary actions including Advanced Notice of Proposed Suspension 28 July 1992; 2. Continuing harassment and assaults by supervisors and coworkers; 3. Previous EEO issues (discrimination, reprisal, harassment, preferential treatment to non-minorities) unresolved; 4. Failure to provide a safe environment; 5. Denied right to see personal physician after traumatic injury; 6. Suppressed and covered up facts concerning assaults and investigations; 7. Reprisal by arbitrarily downgrading my performance appraisals."

2) Corrective Action Requested: "1. Removal of ALL actions in my personnel file; 2. To be reimbursed for all sick leave, annual leave, and leave without pay used to seek medical care and/or to answer to disciplinary actions since 17 March 1992; 3. To remove supervisors Bob Bruner and Al Johns from any civil service position; 4. Re-evaluate all downgraded performance appraisals since working under supervisor Al Johns; 5. For all harassment, discrimination, reprisal, and character defamation to cease and desist; 6. Process all EEO complaints in a timely manner."

E. Agency Case No. DON-93-60036-015, EEOC Case No. 370-94-X2453: plaintiff first sought EEO counseling on 23 March 1993 with Concord Naval Weapons Station EEO Counselor, Paul Rankin. Complaint went formal on 4 August 1993. An off-station EEO investigator from San Diego, Art Alvarez, was assigned to this case on 25 September 1993.

1) Description of Situation: 1. Reprisal by slander from management officials; 2. Falsification and tampering with government documents; 3. Placement of detrimental information within my personnel file; 4. Continued harassment, denial of fair and equitable treatment and discrimination; 5. Withholding pertinent information from my personnel files; 6. Assaulted by coworker Michael Parisi; 7. I further state that, due to the untimely processing by the Command, I have been poisoned in my new position at PWC."

2) Corrective Action Requested:"1. To remove Supervisor Bob Bruner from his civil service position; 2. For all harassment, discrimination, reprisal, and character defamation to cease and desist; 3. Process all EEO complaints in a timely and just manner; 4. Reevaluate all downgraded performance appraisals while working under Supervisor Al Johns; 5. To be reimbursed for all annual leave used to prepare and answer EEO."

3) Summary of findings by EEO investigator, Alvarez: a) "Complainant has successfully established a prima facie case of discrimination based on his national origin inasmuch as he was the only Mexican-American of three (3) Machinists, at the WG-11 level, (at the time of his complaint), who was the recipient of the adverse actions alleged in his complaint." "Complainant also was successful

in establishing a prima facie case based on reprisal. Complainant had filed a prior complaint, DON-92-60036-010, in which both Mr. A. Johns and Mr. R. Bruner were identified as Responsible Management Officials."

F. EEOC Hearing before EEOC Administrative Judge, Thomas Consentino on 19 & 20 July 1994.

G. Plaintiff exhausted three separate appeals of Administrative Judge Consentino's findings with the EEOC appeals board (No. 01952249) with no further right to administrative appeal on 20 March 2000.

Plaintiff has met jurisdiction (U.S. Government Defendant) and timeline to file civil action on 19 June 2000 requesting trial by jury.

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